No. 92-1402-CSX
Status: GRANTED

Title: C & A Carbone, Inc., et al., Petitioners
v.
Town of Clarkstown, New York

Docketed:
February 24, 1993

Court: Appellate Division, Supreme Court of New York, Second Judicial Dept.

Counsel for petitioner: Christian,Betty Jo

Counsel for respondent: Brashares,William C., Glickel,Richard A., Abrams,Robert

10-27-92, New York Ct of Appls den mo for lv to appeal. 1-14-93 ext til 2-24-93, J. Thomas, CITED. 1 set of Lodging consisting of 7 orders/opinions rcd 2-24-93.

Entry	Date	Note	Proceedings and Orders
1	Jan 13 1993	G	Application (A92-538) to extend the time to file a petition for a writ of certiorari from January 25, 1993 to March 11, 1993, submitted to Justice Thomas.
2	Jan 14 1993		Application (A92-538) granted by Justice Thomas extending the time to file until February 24, 1993.
3	Feb 24 1993	G	Petition for writ of certiorari filed.
5	Mar 8 1993		Order extending time to file response to petition until April 30, 1993.
7	Apr 30 1993		Brief of respondent Town of Clarkstown, New York in opposition filed.
6	May 5 1993		DISTRIBUTED. May 21, 1993
8	May 7 1993	X	Reply brief of petitioners C & A Carbone, Inc., et al. filed.
9	May 24 1993		Petition GRANTED.
			**********
11	Jun 8 1993		Order extending time to file brief of petitioner on the merits until July 16, 1993.
16	Jul 15 1993		Brief amicus curiae of National Solid Waste Management Association filed.
13	Jul 16 1993		Joint appendix filed.
14	Jul 16 1993		Brief of petitioners C & A Carbone, Inc., et al. filed.
15	Jul 16 1993		Brief amici curiae of Chemical Manufacturers Association, et al. filed.
17	Jul 16 1993		Brief amici curiae of Incorporated Villages of Westbury, et al. filed.
12	Jul 19 1993		Order further extending time to file brief of respondent on the merits until August 23, 1993.
18	Aug 20 1993		Brief amici curiae of Solid Waste Association of North America, et al. filed.
19	Aug 20 1993		Brief amicus curiae of New Jersey filed.
21	Aug 20 1993		Brief amicus curiae of County of San Diego, CA filed.
22	Aug 20 1993		Brief amici curiae of Town of Smithtown, et al. filed.
20	Aug 23 1993		Brief amicus curiae of City of Springfield, MO filed.
23	Aug 23 1993		Brief amicus curiae of Solid Waste Disposal Authority of the City of Huntsville, AL filed.
24	Aug 23 1993		Brief amici curiae of Prince George's County, Maryland, et al. filed.
25	Aug 23 1993		Brief amici curiae of City of Indianapolis, Indiana, et al. filed.
26	Aug 23 1993		Brief amici curiae of Ogden Projects, Inc., et al. filed.
27	Aug 23 1993		Brief of respondent Town of Clarkstown, New York filed.
28	Aug 23 1993		Brief amici curiae of National Association of Counties, et al. filed.
29	Aug 23 1993		Brief amicus curiae of Clarendon Foundation filed.
30	Aug 23 1993		Brief amici curiae of State of New York, et al. filed.
31	Aug 23 1993		Brief amicus curiae of National Association of Bond Lawyers filed.
32	Aug 23 1993		Brief amici curiae of Ohio, et al. filed.
38	Aug 23 1993	X	Brief amicus curiae of Rockland County filed.
33	Sep 8 1993	G	Application (A93-236) for extension of time to file reply brief, submitted to Justice Thomas.
34	Sep 9 1993		Application (A93-236) granted by Justice Thomas extending the time to file until September 29, 1993.
35	Sep 29 1993		Reply brief of petitioners filed.
36	Oct 12 1993		CIRCULATED.
37	Oct 14 1993		SET FOR ARGUMENT TUESDAY, DECEMBER 7, 1993. (1ST CASE).
39	Oct 25 1993	D	Motion of respondent for leave to file a limited sur-reply brief filed.
40	Nov 2 1993		Opposition of petitioners to motion of respondent filed.
41	Nov 2 1993		LODGING by petitioners. (Attorney's Statement, filed Court of Appeals of New York, and Appellants' Brief, filed Supreme Court of New York, Appellate Division, Second Department)
42	Nov 8 1993		Motion of respondent for leave to file a limited sur-reply brief DENIED.
43	Dec 2 1993		Record filed.
		*	Record proceedings Supreme Court of New York, County of Rockland.
44	Dec 7 1993		ARGUED.

92-1402

No. ——

Supreme Court, U.S.
FILED
FEB 24 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

---

PETITION FOR A WRIT OF CERTIORARI

BETTY JO CHRISTIAN
Counsel of Record
PAUL J. ONDRASIK, JR.
DAVID A. PRICE
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

DAVID SILVERMAN
KENNETH RESNIK
GRANIK SILVERMAN
254 South Main Street
New City, New York 10956-0370
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a local law requiring disposal of all trash, regardless of origin, at a designated local facility, and prohibiting the export of such trash out of state, constitutes a burden on and a discrimination against interstate commerce in violation of the Commerce Clause of the United States Constitution.

LIST OF PARTIES

Petitioners

C & A Carbone, Inc.
Recycling Products of Rockland, Inc.
C & C Realty, Inc.
Angelo Carbone

Respondent in Interest

Town of Clarkstown, New York

Other Respondents

"John Doe 1 through 6"

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	9
I. THE VALIDITY OF FLOW CONTROL LAWS IS A MATTER OF NATIONAL IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT	10
II. FLOW CONTROL LAWS SUCH AS LOCAL LAW 9 BURDEN AND DISCRIMINATE AGAINST INTERSTATE COMMERCE	14
III. THE LOWER COURTS ARE IN DISARRAY AS TO WHETHER FLOW CONTROL LAWS VIOLATE THE COMMERCE CLAUSE	18
CONCLUSION	23

TABLE OF AUTHORITIES

CASES — Page

C & A Carbone, Inc. v. The Town of Clarkstown and Clarkstown Recycling Center, No. 91 Civ. 2105 (CLB) (S.D.N.Y. July 11, 1991) 6-7
Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992) 9, 10, 17
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) ..... *passim*
Container Corp. of Carolina v. Mecklenburg County, No. 92 cv-154-MV (W.D.N.C. June 14, 1992) 18, 21
DeVito v. Rhode Island Solid Waste Management Corp., 947 F.2d 1004 (1st Cir. 1991) 18, 19, 21
Dean Milk Co. v. Madison, 340 U.S. 349 (1951) 17
In re Fiorillo Brothers, 577 A.2d 1316, 242 N.J. Super. 667, *cert. denied*, 122 N.J. 363, 585 A.2d 371 (1990) 18-19, 20
Fort Gratiot Landfill, Inc. v. Michigan Department of Natural Resources, 112 S. Ct. 2019 (1992) 9, 10, 14, 15, 17
Harvey & Harvey, Inc. v. Del. Solid Waste Authority, 600 F. Supp. 1369 (D. Del. 1985) 19, 21-22
H.P. Hood & Sons Inc. v. Du Mond, 336 U.S. 535 (1949) 14, 15
Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985) 18
J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection, 857 F.2d 913 (3d Cir. 1988) 7, 18, 19, 20
New Energy Co. of Ind. v. Limbach, 486 U.S. 269 (1988) 14, 17
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 7, 20, 22
Waste Recycling Inc. v. Southeast Alabama Solid Waste Disposal Authority, Civ. No. 92-T-642-S (M.D. Ala. Feb. 5, 1993) 17, 18, 19-20, 21
Waste Systems Corp. v. Cty. of Martin, No. 92-1642 (8th Cir. Feb. 18, 1993) 16, 18, 19, 21

TABLE OF AUTHORITIES—Continued

STATUTES — Page

Federal

28 U.S.C. § 1257(a) 2
28 U.S.C. § 2403(b) 2

State

Colo. Rev. Stat. § 30-20-107 10
Conn. Gen. Stat. § 22A-220A 10
Del. Code Ann. tit. 7, § 6406(31) 10
Fla. Stat. § 403.713 10
Haw. Rev. Stat. § 340A-3(a) 10
Ill. Ann. Stat. ch. 34, para. 5-1047 10
Ind. Code §§ 36-9-31-3 & -4 10
Iowa Code § 28G.4 10
La. Rev. Stat. 30:2307(9) 10
Me. Rev. Stat. tit. 38, § 1304-B(2) 10
Miss. Code Ann. § 17-17-319 10
Mo. Rev. Stat. § 260.202 10
N.C. Gen. Stat. § 130A-294 10
N.D. Cent. Code, § 23-29-06(6) & (8) 10
N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5 10
1991 N.Y. Laws ch. 569 ..... 2, 10
Ohio Rev. Code Ann. § 343.01(H)(2) 10
Or. Rev. Stat. § 268.317(3) & (4) 10
Pa. Stat. Ann. tit. 53, § 4000.303(e) 10
R.I. Gen. Laws § 23-19-10(40) 10
Tenn. Code Ann. 68-211-814 10
Va. Code Ann. § 15.1-28.01 10
Vt. Stat. Ann. tit. 24, §§ 2203a, 2203b 10
W. Va. Code § 240-2-1h 10
Wash. Rev. Code § 36.58.040, 35.21.120 10
Wis. Stat. § 159.13(3), (11) 10

Local

Town of Clarkstown, New York, Local Laws 1990, No. 9 ..... *passim*

TABLE OF AUTHORITIES—Continued

BOOKS AND ARTICLES	Page
C. Baird Brown, *A Checklist For Legally Enforceable Obligations To Use Disposal Services, in* ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulation, and Contracts and Financing* 325 (1988)	13
C. Baird Brown, *Solid Waste Contracts, in* ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulation, and Contracts and Financing* 213 (1988)	13
Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste At Home*, 76 Minn. L. Rev. 1219 (1992) (student note)	5
Kelly Outten, *Waste To Energy: Environmental and Local Government Concerns*, 19 U. Rich. L. Rev. 373 (1985) (student note)	11
U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action (Background Document)* (Sept. 1988)	11, 12
MISCELLANEOUS	
Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. (1991)	9, 11
U.S. Const. Art. I, sec. 8, cl. 3	*passim*
Sup. Ct. Rule 29.1	2
Sup. Ct. Rule 29.4(c)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. ——

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

Petition for a Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

---

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the Supreme Court, Appellate Division, Second Department of the State of New York was rendered on August 31, 1992. That decision is reported at 182 A.D.2d 213 and 587 N.Y.S.2d 681 and is reproduced at pages 1a-15a of the appendix to this petition ("Pet. App."). The decision of the Court of Appeals of the State of New York denying petitioners' motion for leave

to appeal, rendered on October 27, 1992, is reported at 80 N.Y.2d 260 and 605 N.E.2d 874 and is reproduced at Pet. App. 47a.

The July 15, 1991 decision of the court of original jurisdiction, the Supreme Court of the State of New York, County of Rockland, is unreported and is reproduced at Pet. App. 22a-33a. The September 16, 1991 opinion of that court upon reargument is unreported and is reproduced at Pet. App. 16a-21a.

The July 11, 1991 decision of the United States District Court for the Southern District of New York in a related action between the parties is reported at 770 F. Supp. 848 and is reproduced at Pet. App. 34a-46a.[1]

JURISDICTION

The decision of the Supreme Court, Appellate Division, Second Department of the State of New York was issued on August 31, 1992. An order denying petitioners' timely motion for leave to appeal was issued by the Court of Appeals of the State of New York on October 27, 1992. The time within which to file this petition was extended to February 24, 1993 by order of Justice Thomas dated January 14, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

---

[1] All parties to the proceeding below are identified in the list of parties, *supra*. "John Doe 1 through 6" were named defendants below, but to the best of petitioners' knowledge, do not refer to any real persons or entities. There are no parent companies or non-wholly-owned subsidiaries to be listed pursuant to Rule 29.1 of this Court.

In accordance with Rule 29.4(c), petitioners note that this case could be viewed as drawing the constitutionality of a New York State statute into question and that 28 U.S.C. § 2403(b) may be applicable. The statute involved is enabling legislation, the Holland-Gromack Law, 1991 N.Y. Laws ch. 569, at 1687-89, which authorizes municipalities within Rockland County, N.Y., to adopt local flow control ordinances.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution, Art. I, sec. 8, cl. 3, provides in pertinent part: "The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ."

Local Laws, 1990, No. 9 of the Town of Clarkstown, New York ("Local Law 9"), is reproduced at Pet. App. 48a-54a. Most pertinent, Sections 3(C)-(D) and 5(A) provide that:

> Section 3. Collection and Disposal of Acceptable Waste
>
> • • • •
>
> C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility located at Route 303, West Nyack, New York or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code . . . . As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown.
>
> D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than the facilities or sites set forth in Paragraph "C" above.
>
> • • • •
>
> Section 5. Acceptable and Unacceptable Waste Generated Outside the Town of Clarkstown
>
> A. It shall be unlawful, within the Town, to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pur-

suant to agreement with the Town of Clarkstown and recyclables . . . brought to Clarkstown recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code.

STATEMENT OF THE CASE

This case involves a challenge under the Commerce Clause to a local ordinance that prohibits the export of trash to points outside the town. Until issuance of the decision below, petitioners were in the business of receiving trash from customers in New Jersey and New York State, separating the trash into recyclable and non-recyclable parts, sending the recyclable parts to recycling processors and sending the non-recyclable parts out of state to landfills or to facilities that burn the waste to generate power. Pet. App. 35a. Petitioners shipped 150 tons of separated trash per week to Ohio, Delaware, Pennsylvania, Kentucky, Indiana, and Florida. Rec. 82. Petitioners' operation served essentially as a broker between sources of trash and facilities that can recycle, use, or dispose of the trash.

Petitioners have been enjoined from engaging in this business as the result of a state court action brought by the Town of Clarkstown, New York, in which petitioners' operation is located. Pet. App. 14a, 32a. The action was brought to enforce a local ordinance requiring that all acceptable waste—whether originating in the town, in other points in New York, or out of state—must be disposed of at the town's designated trash disposal facility or at an approved recycling center.[2] Pet. App. 24a-25a;

[2] "Acceptable" waste under Local Law 9 includes residential, commercial, and industrial solid waste, but does not include hazardous waste (i.e., waste designated as hazardous under various federal statutes), pathological waste (i.e., various types of medical waste and other types of infectious or biohazardous waste), and sludge (i.e., waste from a sewage treatment plant, wastewater treatment plant, water supply treatment plant, or air pollution control facility). Local Law 9 § 1, Pet. App. 48a-49a.

Local Law 9, §§ 3(A) and 5(A), Pet. App. 51a, 53a. Ordinances of this type, requiring that certain types of waste in a locality must be brought to a designated facility and cannot be exported, are known as "flow control" ordinances. *See* Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste At Home*, 76 Minn. L. Rev. 1219, 1230-31 (1992) (student note).

Local Law 9 permits approved recycling centers, such as petitioners' operation, to send recyclable materials out of town for processing.[3] Local Law 9 §§ 3(C) and 5(A), Pet. App. 51a, 53a. However, the ordinance requires such recycling centers to send the nonrecyclable parts of their trash to the town's designated trash disposal facility. *Id.* The ordinance thus prohibits the movement of the nonrecyclable trash from the recycling center to out-of-state destinations.

The town's designated trash disposal facility is operated by a private contractor, under an agreement with the town. Pet. App. 35a. The designated facility charges a tipping fee of $81 per ton to handle trash, substantially more than the $70 per ton tipping fee charged by petitioners. *Id.* Under its agreement with the town, the contractor is guaranteed a certain quantity of trash to process. *Id.* In return for this guarantee, the town has

[3] Petitioners' facility is an authorized recycling center. Pet. App. 6a.

The town sought in the courts below to characterize petitioners' facility as a "transfer station." Pet. App. 26a. Because petitioners' bypassing of the town-designated facility is prohibited by Local Law 9 whether their operation is characterized as a recycling center or a transfer station, the choice of labels is not directly material to this action. The town may have been attempting to establish a record that would enable it to close petitioners' facility pursuant to a local zoning ordinance, not challenged here, under which all transfer stations other than the town-designated transfer station are prohibited. In any event, the town's characterization was never adopted by the courts below.

the right to acquire the facility in five years for a price of one dollar. *Id.*

If the guaranteed quantity is not forthcoming, the town must pay the contractor the difference in lost revenue. *Id.* Local Law 9 was enacted to reduce the possibility that the town would have to pay under the guarantee. Pet. App. 35a, 43a.

The town sued petitioners in the Supreme Court of Rockland County on March 18, 1991, seeking an injunction to compel them to cease disposing of their non-recyclable trash at any site other than the designated facility. Pet. App. 36a. In the First Amended Answer to the First Amended Complaint, petitioners asserted a defense based on the invalidity of Local Law 9 under the Commerce Clause. Pet. App. 55a, Rec. 407. Petitioners also asserted defenses at that time under the Due Process Clause and state law.

On March 27, 1991, while the state court action was pending, petitioners instituted a federal court action in the Southern District of New York. *C & A Carbone, Inc. v. The Town of Clarkstown and Clarkstown Recycling Center*, No. 91 Civ. 2105 (CLB), S.D.N.Y. On July 11, 1991, the federal court (Brieant, C.J.) granted a preliminary injunction against the enforcement of Local Law 9 with respect to trash originating outside the town. Pet. App. 45a. That court held it "likely" that petitioners could demonstrate the law to be an impermissible burden on interstate commerce:

> Although ostensibly Local Law No. 9 was promulgated to protect the health and environment of the residents of Clarkstown from the hazards associated with dumping solid wastes in landfills, the Town cannot legislatively slow down or prohibit the flow of commerce, in this case, interstate solid waste products, by artificially inflating the price of processing solid waste generated without the Town from

> $70/ton to $81/ton and thereby augment the economic security of the Town.
>
> It does not seem likely that the Town's interest in meeting its tonnage requirements to defendant Clarkstown Recycling Center, Inc. and in so doing avoid a penalty for each ton under the requisite annual minimum of 120,000 tons . . . can constitutionally justify the requirement that solid waste processors and carters expend the sum of $81/ton, rather than the $70/ton they paid prior to the enactment of Local Law No. 9, to process and cart the same without of Town solid waste to the same without of Town facilities. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) . . . .

Pet. App. 43a.

The federal district court's preliminary injunction was dissolved after the Supreme Court of Rockland County issued a decision holding Local Law 9 to be constitutional, granting summary judgment to the town, and issuing an injunction against petitioners. Pet. App. 32a. Relying on the Third Circuit's decision in *J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Environmental Protection*, 857 F.2d 913 (3d Cir. 1988), the state court held that Local Law 9 did not violate the Commerce Clause because it treated trash originating out-of-state the same as trash originating in-state. Pet. App. 29a-31a. Wholly ignoring the export restriction, the court concluded that "defendants have failed to demonstrate that Local Law #9 has any 'demonstrable effect whatsoever on the interstate flow of goods.'" *Id.* at 30a. The court also rejected petitioners' due process and state law claims.

On reargument, the state trial court again held for the town. Pet. App. 17a. With respect to the Commerce Clause the trial court, applying the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1979), indicated that petitioners had not provided sufficient informa-

tion concerning "the nature of their alleged interstate commerce activities" and that the law had therefore not been shown to be invalid. Pet. App. 18a. It was uncontroverted that the law was being enforced with respect to shipments of trash that included trash originating out of state, but the court considered that to be an insufficient showing. Pet. App. 19a, 26a. The state court again made no mention of the fact that Petitioners shipped *all* of their trash *to* out-of-state facilities after separation.

Petitioners appealed to the Appellate Division, Second Department, which affirmed the trial court's decision. Pet. App. 14a. Like the trial court, the Appellate Division did not address the impact of the ordinance on the export of trash. The Appellate Division held Local Law 9 to be valid under the Commerce Clause because it "applies evenhandedly to all solid waste processed within the Town, regardless of point of origin," Pet. App. 11a. It also concluded that the $11 per ton differential in processing charges, if it had "any effect on the interstate flow of solid waste," was permissible in light of "the legitimate and significant public concerns underlying the local law. . . ." Pet. App. 12a. The Appellate Division took note of the contrary views expressed by the federal court, but stated that the federal decision "does not require that we rule in [petitioners'] favor here." *Id.* The New York Court of Appeals denied petitioners' motion for leave to appeal. Pet. App. 47a.

REASONS FOR GRANTING THE WRIT

This case involves an issue that has divided the lower courts—the validity, under the Commerce Clause, of a flow control law that prohibits the disposal of trash at any point other than a "designated facility" within the locality. Generally enacted by local jurisdictions that have a financial stake in the designated facility, such ordinances restrict the export of trash to locations out of state that may be able to use the trash or accomplish disposal at a lower cost.

An estimated 15 million tons of solid waste, not including hazardous waste, moves in interstate commerce each year. *See Interstate Transportation of Solid Waste: Hearings Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce*, 102d Cong., 1st Sess. 263 (1991) (hereinafter "*1991 House Hearings*") (statement of Allen Moore, President, National Solid Wastes Management Association). This Court long ago ruled that trash is entitled to the protection of the Commerce Clause. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Last Term, it confirmed that state or local laws that prohibit or discriminate against the import of trash originating out of state or outside the locality violate the Commerce Clause unless shown to be justified by legitimate local concerns that cannot adequately be met by nondiscriminatory alternatives. *See Fort Gratiot Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992). The constitutional implication of laws restricting the export of trash to other states has now become equally important, and guidance from the Court is urgently needed.

I. THE VALIDITY OF FLOW CONTROL LAWS IS A MATTER OF NATIONAL IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT

In recent years, an increasing number of localities have adopted flow control laws such as Local Law 9 as a means of financing waste disposal projects. At least twenty-six states now expressly grant localities or state agencies the authority to adopt flow control regulations.[4]

Unlike the laws considered by this Court in *Chemical Waste Management*, *supra*; *Fort Gratiot Landfill*, *supra*; and *City of Philadelphia*, *supra*, which sought to prohibit or burden the importation of waste into a state or municipality, flow control laws seek to prohibit or burden the export of waste out of the state or municipality. As explained *infra* at pp. 18-22, these laws have spawned extensive Commerce Clause litigation in the federal and state courts, with those courts reaching divergent results.

The problem that has led to protectionist legislation here, and in other localities that have similar laws, is the mirror image of the "not-in-my-back-yard" syndrome that

---

[4] Colorado (Colo. Rev. Stat. § 30-20-107); Connecticut (Conn. Gen. Stat. § 22A-220A); Delaware (Del. Code Ann. tit. 7, § 6406(31)); Florida (Fla. Stat. § 403.713); Hawaii (Haw. Rev. Stat. § 340A-3(a)); Illinois (Ill. Ann. Stat. ch. 34, para. 5-1047); Indiana (Ind. Code §§ 36-9-31-3 & -4); Iowa (Iowa Code § 28G.4); Louisiana (La. Rev. Stat. 30:2307(9)); Maine (Me. Rev. Stat. tit. 38, § 1304-B(2)); Mississippi (Miss. Code Ann. § 17-17-319); Missouri (Mo. Rev. Stat. § 260.202); New Jersey (N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5); New York (1991 N.Y. Laws ch. 569, at 1687-89); North Carolina (N.C. Gen. Stat. § 130A-294); North Dakota (N.D. Cent. Code, § 23-29-06(6) & (8)); Ohio (Ohio Rev. Code Ann. § 343.01 (H)(2)); Oregon (Or. Rev. Stat. § 268.317(3) & (4)); Pennsylvania (Pa. Stat. Ann. tit. 53, § 4000.303(e)); Rhode Island (R.I. Gen. Laws § 23-19-10(40)); Tennessee (Tenn. Code Ann. 68-211-814); Vermont (Vt. Stat. Ann. tit. 24, §§ 2203a, 2203b); Virginia (Va. Code Ann. § 15.1-28.01); Washington (Wash. Rev. Code § 36.58.040, 35.21.120); West Virginia (W. Va. Code § 240-2-1h); Wisconsin (Wis. Stat. § 159.13(3), (11)).

led to the earlier restrictions on importing waste. Flow control laws instead represent an effort to shift the costs of waste disposal facilities for which a locality has contracted.

As the U.S. Environmental Protection Agency has noted, one of the "major factors" affecting the financial risk of a waste disposal project—such as a landfill, a waste-to-energy plant, or a recycling plant—is the availability of a steady supply of waste. *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action (Background Document)* 3.B-2 (Sept. 1988) (hereinafter "*The Solid Waste Dilemma*"). Flow control ordinances are a convenient means of insuring the supply of waste to a facility. *See id.* at 3-C.3; Kelly Outten, *Waste To Energy: Environmental and Local Government Concerns*, 19 U. Rich. L. Rev. 373, 392 (1985) (student note).

The political attraction of flow control laws is apparent. By forcing all waste that makes its way into the local jurisdiction to go to the designated local disposal facility, possibly at an inflated cost, the locality can shift some of the cost of operating the facility away from its own citizens. These costs have increased significantly, and will continue to increase, as a result of stricter environmental safeguards imposed on the construction and operation of the facilities, as well as other cost trends. *See* Outten, *supra*, at 375; *1991 House Hearings* at 317-18 (statement of Richard F. Goodstein, Divisional Vice President, National Government Affairs, Browning-Ferris Industries). In shifting these costs, however, flow control laws impose a burden on the citizens of other areas, who also have to deal with waste disposal problems—and who will inevitably be tempted to enact a similar law for their own benefit. This kind of Balkanization, in which states or localities seek to advance their own interests by erecting barriers to the free movement of waste, is precisely what the Commerce Clause was intended to prevent.

The impact of such laws on waste handlers such as petitioners, who seek to handle waste moving in interstate commerce, is also apparent.[5] By prohibiting such businesses from sending waste directly to out-of-state landfills or users of the waste, flow control laws force such companies to subsidize the designated facilities rather than selecting a more competitive facility in the interstate market. The burden is particularly heavy where, as here, the tipping fee charged by the designated facility is significantly above the competitive rate.

Moreover, the effects of a state or local ban on the export of trash extend beyond the solid waste industry. For example, by limiting the source availability of trash or artificially raising its price, such laws obstruct the use of solid waste as a source of energy. In this case, petitioners sent substantial volumes of nonrecyclable waste to "resource recovery centers," which burn trash to generate electricity. Rec. 332. Such movements are precluded under Local Law 9.[6]

Flow control laws also have a major impact on the interstate motor carriers and railroads that haul solid waste from one state to another. The impact is illustrated by this case, in which the town detained out-of-state trucks and confiscated their loads. Rec. 83-87, 111, 112. Motor carriers and railroads can hardly be expected to be familiar with the local economic ordinances of every town or county where they transport waste. Yet flow control laws subject them to the risk of disruption of

---

[5] Indeed, most of the cases that have arisen challenging flow control laws, discussed *infra* at pp. 18-22, were initiated by one or more privately-owned waste facilities whose interstate business was directly affected by the law.

[6] In addition, as the U.S. Environmental Protection Agency has found, flow control laws have restricted the recovery of paper for recycling. *See The Solid Waste Dilemma, supra*, at 3.D-6.

their interstate operations and loss of revenue if they unknowingly handle a shipment not destined for a designated facility.

Finally, the constitutionality of flow control laws is of obvious importance to the states and localities that have enacted, or are considering the enactment of, such laws. Financial obligations are being incurred by towns and counties across the country on the assumption that they will be able to prevent the export of trash, thus insuring a captive supply of waste and monopoly prices for the designated facility. *See* C. Baird Brown, *Solid Waste Contracts, in* ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulation, and Contracts and Financing* 213, 227 (1988).

If, as we believe, such flow control laws violate the Commerce Clause, these local governmental units need to know this now, so that their solid waste management decisions can be made on a fully informed basis.[7] On the other hand, if flow control laws are found not to violate the Commerce Clause, then the localities will benefit from a decision of this Court that dispels the existing cloud

---

[7] For much the same reasons, the bondholders and contractors who finance the construction and operation of waste facilities need certainty as to whether flow control laws are enforceable. Although these financing arrangements are typically backed by "use or pay" contracts such as the one entered into by the town of Clarkstown here, the validity of flow control laws still has practical consequences for these parties. As one commentator has explained, if the flow of waste is inadequate, thereby forcing the locality to make good on its minimum tonnage guarantee, "that community will be looking for every way it can to get out of its contract. So the underwriters are going to want to be able to tell the bondholders that there's lots of waste and that it's all coming to the project." C. Baird Brown, *A Checklist For Legally Enforceable Obligations To Use Disposal Services*, in ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulation, and Contracts and Financing* 325 (1988).

that has resulted from the disarray of the lower courts, discussed in Part III of this petition.

II. FLOW CONTROL LAWS SUCH AS LOCAL LAW 9 BURDEN AND DISCRIMINATE AGAINST INTERSTATE COMMERCE

Only last term, this Court in *Fort Gratiot* reiterated that "the Commerce Clause prohibits States from 'advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, *either into or out of the state*.'" 112 S. Ct. at 2019 (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949)) (emphasis added). Such a statute is unconstitutional unless it "is demonstrably justified by a valid factor unrelated to economic protectionism," *Id.* at 2024 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 274 (1988)), which "cannot be adequately served by nondiscriminatory alternatives," *Id.* at 2027.

In upholding Local Law 9, the court below simply ignored its effect on the movement of trash *out* of the town. Rather, the lower court focused solely on the incoming side of the equation and concluded that, because the export restriction "applies evenhandedly to all solid waste processed within the town, regardless of point of origin," Pet. App. 11a, there could be no burden on interstate commerce. This analysis misses the point. It is the export restriction itself—not the origin of the trash to which it applies—that creates a burden on and a discrimination against interstate commerce. This issue was not even addressed by the court below.

When subjected to a proper analysis, it is apparent that Local Law 9 cannot pass constitutional muster. Under its terms, anyone with nonrecyclable waste—whether originating in the town, in other points in New York, or in other states—must dispose of it at the local, town-authorized disposal facility, and cannot do business

with other facilities located outside the town or outside the state. A clearer example of a law that "curtail[s] the movement" of goods "out of the state" (*H.P. Hood*, 336 U.S. at 535) is difficult to imagine.

Indeed, the uncontroverted facts demonstrate that such a curtailment has in fact resulted from the ordinance. Before the enforcement of Local Law 9 against petitioners, their facility was sending nonrecyclable material directly to landfills and power generating plants in Ohio, Delaware, Pennsylvania, Kentucky, Indiana and Florida. Pet. App. 26a. Local Law 9, on its face and as applied in this case, thus burdens and discriminates against interstate commerce, sheltering the in-state interest—the designated disposal facility—from out-of-state competition. Given this fact, Local Law 9 could be upheld only if it were shown to be "demonstrably justified by a valid factor unrelated to economic protectionism." *Fort Gratiot*, 112 S. Ct. at 2024 (citation omitted). No such showing has been—or could be—made.[8]

It is clear that the driving force behind Local Law 9, like that of other flow control laws, is economic. The injunction against petitioners' operations was not based on any health, safety, or aesthetic objections to petitioners' center—which indeed is licensed by the State. Pet. App. 3a. In enacting the enabling legislation that authorized the town to adopt Local Law 9, the state legislature stated that its purpose was "to make these facilities [with which the town contracted] technically and economically viable." Rec. 376.

The town's own evidence confirmed that Local Law 9 was enacted because the financial benefit conferred by it

---

[8] The court below failed to analyze Local Law 9 under this criterion, applying instead the lenient standards applicable to a neutral regulation that imposes only an incidental burden on interstate commerce. Pet. App. 12a. This was clear error.

upon the operator of the designated trash disposal facility ultimately confers a financial benefit upon the town itself. As the town supervisor explained, a contractor constructed the designated facility for the town, which has the right to purchase the facility at the end of five years for $1. Pet. App. 35a. In return, the town was required to guarantee the operator of the designated facility at least 120,00 tons of trash per year, and must pay it a per-ton penalty if it fails to receive the guaranteed minimum. Operations such as petitioners', which bypass the designated facility, increase the likelihood that the guarantee might not be met—unless those operations are halted by an export ban. *See* Charles Holbrook Aff., Rec. 60.[9]

Thus, despite the reference of the Appellate Division to the safety and health aspects of solid waste disposal, Pet. App. 9a, it is clear that the purported safety and health benefits of Local Law 9 derive simply from "the continued economic viability" of the town's waste facility. Pet. App. 10a. In this respect, the situation here is the same as that before the Eighth Circuit in *Waste Systems Corp. v. Cty. of Martin*, No. 92-1642 (8th Cir. Feb. 18, 1993), where the court observed that although the construction of the disposal facility may have been prompted by "legitimate environmental concerns, the purpose behind the Ordinances is solely economic." Slip op. at 15.[10]

As with other flow control laws, the essential flaw of Local Law 9 is that it seeks to advance the economic interests of the town's own residents through restrictions

[9] The supervisor explained, "By unlawfully bypassing the TOWN's transfer station, defendants are costing the TOWN and its residents thousands of dollars daily in uncollected revenues as well as increasing the likelihood of TOWN's failure to meet its contractual obligation to the transfer station." Charles Holbrook Aff., Rec. 60.

[10] The *Waste Systems* decision is not yet reported. Copies of this and other unreported decisions cited in this Petition have been lodged with the Clerk of the Court.

on interstate commerce. As this Court has emphasized, while a locality "has every right to protect its residents' pocketbooks," it cannot do so "by the illegitimate means of isolating the [locality] from the national economy." *City of Philadelphia v. New Jersey*, 437 U.S. at 626-27; *accord*, *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. at 2012. This is precisely what Local Law 9 does. By attempting to insure its ability to meet the minimum tonnage guarantee through a ban on the export of trash by petitioners, the town has imposed a burden on interstate commerce that cannot withstand constitutional scrutiny.[11] The Eighth Circuit has accurately described similar ordinances as "economic protectionism, serving to protect in-state economic interests at the expense of out-of-state competitors." *Waste Systems*, slip op. at 14.

Moreover, even if a flow control law could somehow be shown to be something other than pure economic protectionism, given its " 'patent discrimination against interstate trade' " *Chemical Waste Management*, 112 S. Ct. at 2014 n.5 (citation omitted), it still must be invalidated unless it is shown that the law "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988); *see also Fort Gratiot*, 112 S. Ct. at 2027. But, as an Alabama district court in *Waste Recycling Inc. v. Southeast Alabama Solid Waste Disposal Authority*, Civ. No. 92-T-642-S, slip op. at 29 (M.D. Ala. Feb. 5, 1993) recently observed, there are numerous other means by which the financial viability of a waste disposal program can be assured, including competing with facilities such as petitioners' by charging competitive rates, or supplementing any shortfall through

[11] The fact that the ban on export applies to the movement of goods to other localities within the State of New York, as well as to movements out of state, does not save the ordinance from constitutional infirmity. *Fort Gratiot*, 112 S. Ct. at 2024-25; *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951).

increases in local taxes or utility charges. Given these readily-available alternatives, a flat ban on the direct export of waste plainly constitutes a burden on and discrimination against interstate commerce forbidden by the Commerce Clause.

III. THE LOWER COURTS ARE IN DISARRAY AS TO WHETHER FLOW CONTROL LAWS VIOLATE THE COMMERCE CLAUSE

Four federal courts of appeals have now had occasion to address the issue of the constitutionality of flow control laws. Two of these courts—the Eighth Circuit and the First Circuit—have concluded that flow control laws violate the Commerce Clause. *Waste Systems Corp. v. Cty. of Martin*, No. 92-1642 (8th Cir. Feb. 18, 1993); *DeVito v. Rhode Island Solid Waste Management Corp.*, 947 F.2d 1004 (1st Cir. 1991) (granting preliminary injunction), *aff'g*, 770 F. Supp. 775 (D.R.I. 1991).[12] On the other hand, the Third Circuit and the Sixth Circuit, like the Appellate Division here, have upheld flow control laws against Commerce Clause challenge. *See J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envir. Prot.*, 857 F.2d 913 (3d Cir. 1988); *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985).

This same split appears in the decisions of the federal district courts and state courts. Within the past year, two federal district courts have held flow control laws invalid under the Commerce Clause. *See Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority, supra; Container Corp. of Carolina v. Mecklenburg County*, No. 92 cv-154-MV (W.D.N.C. June 14, 1992) (granting preliminary injunction). Other courts, however, have found flow control laws permissible. *See In re Fiorillo Bros.*, 577 A.2d 1316, 242 N.J. Super. 667, *cert. denied*, 122 N.J. 363, 585 A.2d 371 (1990); *Harvey & Harvey, Inc. v. Del. Solid Waste Auth.*, 600 F. Supp. 1369 (D. Del. 1985).

[12] The First Circuit in *DeVito* affirmed the district court's opinion "for substantially the reasons stated therein." 947 F.2d at 1004.

These divergent results cannot be explained solely by variations in the particular flow control laws being considered. Rather, the decisions reveal fundamental differences in the analytical framework within which the Commerce Clause inquiry is conducted.

At the outset, there is no consensus among the lower courts as to the Commerce Clause significance of the fact that a flow control law, by forcing trash to go to a particular facility, necessarily restricts the export of trash to out-of-state points. The court below simply ignored the export restriction and upheld the law after concluding that trash originating in the state or locality is not treated more favorably than trash originating elsewhere. Pet. App. 11a. The Third Circuit in *J. Filiberto* concluded that as long as the trash ultimately finds its way into the stream of interstate commerce, a law prohibiting its export except through a designated facility has "no demonstrable effect whatsoever on the interstate flow of goods." 857 F.2d at 922. And the Delaware court in *Harvey & Harvey* treated trash as an object with "a negative value," concluding on that basis that restrictions on its export will not "impose a significant economic burden on out-of-state economic interests." 600 F. Supp. at 1380.

In contrast, the Eighth Circuit and the First Circuit have treated the export-restricting aspect of flow control laws as placing such laws in the category of those that "overtly slow or freeze the flow of commerce." *DeVito*, 770 F. Supp. at 782 (citing *City of Philadelphia v. New Jersey*, 437 U.S. at 624). The Eighth Circuit in *Waste Systems* noted that restrictions on "export of in-state waste to out-of-state facilities" are subject to the Commerce Clause no less than import restrictions are. Slip op. at 9. In *Waste Recycling*, the Alabama district court

treated even an ordinance that expressly permitted the disposal of some trash out-of-state, subject to reporting requirements, as one that has "the practical effect of discriminating against the transport of solid waste." Slip op. at 23.

These divergent views as to the Commerce Clause implications of restrictions on exports have led directly to a division in the lower appellate courts over the criteria by which flow control laws should be judged—whether they have merely an incidental effect on interstate commerce and are thus subject to the liberal balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), or whether they fall in the category of protectionist restrictions on commerce itself, where a burden on interstate commerce can be justified only if the law advances legitimate local purposes that cannot be met by nondiscriminatory means. *See City of Philadelphia v. New Jersey*, 437 U.S. at 624. The court below applied the *Pike* test without discussion, concluding that the effect on interstate commerce was "incidental" and not "impermissibly burdensome" when "weighed against the legitimate and significant public concerns underlying the local law." Pet. App. at 12a. The Third Circuit in *J. Filiberto Sanitation*, a decision relied on by the court below, accepted as "legitimate, non-protectionist purposes" the claim that the regulations "rationally and efficiently organize the collection and disposition of solid waste" and "discourage illegal dumping by directing waste flows to prescribed disposal sites," 857 F.2d at 920, and indicated that a *Pike v. Bruce Church* balancing test would be appropriate.[13] Similarly, the New Jersey appellate court in *Fiorello Brothers* "applied the *Pike* test," 577 A.2d at 1323, in upholding a New Jersey flow control law.

[13] Because the Third Circuit concluded there was no burden at all on interstate commerce, it did not perform an actual balancing but did conclude that "the local benefits of the Rule are substantial." 857 F.2d at 922.

In contrast, the Eighth Circuit in *Waste Systems* held that because the flow control ordinances discriminated against interstate commerce, the more deferential analysis of *Pike* was not appropriate. That court further held that the plainly economic purpose of the ordinances—*i.e.*, to promote the financial success of the local disposal facility—rendered them *per se* invalid as protectionist. Slip op. at 13-14. Similarly, the *DeVito* opinion, which was "substantially" adopted by the First Circuit, focused on the fact that the "immediate purpose and effect" of the law was "to increase [the state entity's] revenues by preventing commercially generated waste from being transported out of Rhode Island" and concluded that this demonstrated "that the regulation is an essentially protectionist measure" subject to the *City of Philadelphia* standard. 770 F. Supp. at 781, *aff'd*, 947 F.2d 1004.

This same dichotomy runs through the decisions of the trial courts. Thus a federal district court in Alabama held three different types of flow-control ordinances to violate the Commerce Clause, reasoning that despite their variations all stem from "pure economic protectionism: to provide a sure source of income for the Authority by keeping locally generated solid waste out of interstate commerce. . . ." *Waste Recycling, Inc.*, slip op. at 28. Similarly, a North Carolina district court concluded that a flow control regulation "served as an essentially protectionist measure" and that its implementation "would be discriminatory in its practical effect and subject to 'per se' illegality analysis." *Container Corp.*, slip op. at 20, 21.

A federal district court in Delaware, on the other hand, rejected a Commerce Clause challenge to Delaware flow control laws, accepting general legislative recitals of purpose as demonstrating that the statute was "not a typical case of economic protectionism," and upholding the statute on the ground that 'the impact upon interstate commerce is [not] 'clearly excessive in relation to the

putative local benefits.'" *Harvey & Harvey*, 600 F. Supp. at 1380-81 (quoting *Pike v. Bruce Church*, 397 U.S. at 142).

These divergent approaches to the evaluation of the constitutionality of flow control laws can only be resolved by definitive guidance from this Court. Given the widespread prevalence of flow control laws, litigation over their validity under the Commerce Clause seems certain to continue. The issues have been thoroughly ventilated and it is unlikely that a consensus will emerge at the federal court of appeals and state supreme court level.

This case presents an ideal vehicle to resolve this important issue. The ordinance here involved is a comprehensive one—it applies to all trash in the state, regardless of whether the trash originated locally, in-state, or out-of-state. The ordinance is also straightforward—it requires all nonrecyclable trash, without exception, to go to the designated facility. The economic consequences of the ordinance are undisputed: the designated facility, charges $11 per ton more than petitioners' facility, and the waste being handled by petitioners results in a loss to the designated facility of "thousands of dollars daily in uncollected revenues as well as increasing the likelihood of TOWN's failure to meet its contractual obligation to the transfer station." Charles Holbrook Aff., Rec. 60.

A grant of certiorari in this case would thus permit this Court to provide urgently needed guidance to the lower courts concerning the key Commerce Clause issues raised by flow control laws, which have already been authorized in more than half of the states.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

BETTY JO CHRISTIAN
Counsel of Record
PAUL J. ONDRASIK, JR.
DAVID A. PRICE
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

DAVID SILVERMAN
KENNETH RESNIK
GRANIK SILVERMAN
254 South Main Street
New City, New York 10956-0370
Counsel for Petitioners

APPENDICES

APPENDIX A

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION: SECOND JUDICIAL DEPARTMENT

[August 31, 1992]
Argued—November 21, 1991

91-07786
91-08409
91-09014

THE TOWN OF CLARKSTOWN,
respondent,

v

C & A CARBONE, INC., *et al.*,
appellants,
defendants.

OPINION & ORDER

APPEAL by the defendants C&A Carbone, Inc., Recycling Products of Rockland, Inc., C&C Realty, Inc., and Angelo Carbone, in an action, *inter alia*, to permanently enjoin violations of Local Laws, 1990, No. 9 of the Town of Clarkstown, (1) from an order of the Supreme Court (Robert J. Stolarik, J.), dated July 15, 1991, and entered in Rockland County, which granted the plaintiff's motion for summary judgment, (2) from a judgment of the same court dated July 31, 1991, which declared that Local Laws, 1990, No. 9 of the Town of Clarkstown is valid and that the appellants are in violation thereof, permanently enjoined the appellants from operating their business at their premises located at 183 Western High-

way, West Nyack, in Rockland County, in violation of that local law, and directed that the appellants immediately cease all operations in violation of that local law and Town of Clarkstown Code chapter 106, and (3) as limited by their brief, from so much of an order of the same court dated September 16, 1991, as, upon reargument and renewal, adhered to the original determination.

Granik Silverman Sandberg Campbell Nowicki Resnik, New City, N.Y. (Morrie Slifkin, David W. Silverman, Kenneth H. Resnik, and Ricki H. Berger of counsel), for appellants.

Richard A. Glickel, West Nyack, N.Y., for respondent.

HARWOOD, J.

On this appeal, we examine the constitutionality of a local law which mandates that all solid waste processed or otherwise handled within the locality be processed or handled at a designated facility. In light of the health, safety, and environmental concerns connected with solid waste management and disposal, we conclude that the challenged local law constitutes a valid exercise of the locality's police power which offends neither the Commerce Clause of the United States Constitution nor the Due Process Clauses of the United States and New York State Constitutions. We therefore uphold the judgment of the Supreme Court which enjoins the appellants from violating that law.

The appellant C&C Realty, Inc. (hereinafter C&C) is the owner of property located within the plaintiff Town of Clarkstown at 183 Western Highway, West Nyack, in Rockland County. The appellant C&A Carbone, Inc. (hereinafter C&A), of which the appellant Carbone is an officer, and the appellant Recycling Products of Rockland, Inc. (hereinafter Recycling), of which the appellant Carbone is part owner, are interrelated corporations which, according to a complaint the corporate appellants filed in the United States District Court for the Southern District of New York, are in the "interstate business" of bringing

to the Western Highway premises "certain waste materials" which are sorted "into waste which is recyclable and waste which is not recyclable" and then shipped to disposal facilities outside the state. On July 17, 1987, the New York State Department of Environmental Conservation (hereinafter the DEC) issued to C&A a permit authorizing it to operate at the Western Highway site, on certain conditions and with limited permission to manage recyclables, a "Transfer Station", which is presently defined by New York State regulations as a "solid waste management facility other than a recyclables handling and recovery facility * * * where solid waste is taken from the collection vehicles and placed in other transportation units for movement to another solid waste management facility" (6 NYCRR 360-1.2[b][15]). The appellants assert that the "tipping fee" presently charged to truckers and haulers using the Western Highway facility is $70 per ton, which fee the appellants are apparently free to lower or raise as they see fit. The initial expiration date on C&A's permit was July 31, 1992, and the appellants acknowledge that if a permit were to be issued today, or if the current permit were to be renewed, it would be subject to the more stringent regulations promulgated after enactment of the Solid Waste Management Act of 1988 (*see*, L 1988, ch 70).

On August 7, 1989, the Town and the DEC entered into a consent decree to close a municipal landfill located on Route 303 in West Nyack which had been operated by the Town since in or about 1950, and which, from the early 1970's, when the State adopted a comprehensive refuse and solid waste regulatory scheme (*see*, ECL art 27), was periodically cited for environmental violations. Pursuant to the 1989 consent decree the Town was required to develop and implement a remedial plan which would address the adverse environmental consequences caused by the landfill and by its closing. In contemplation thereof, the Town filed an Environmental Assessment Form for the construction of a Solid Waste Trans-

fer Station at the Route 303 site. In June 1989 based in part on a report which is not included in the record before us, and following a public comment period, the Town issued a negative declaration that the construction and operation of a town transfer station on the closed landfill site would not have a significant impact on the environment (*see*, ECL 8-0109[4]; *see also*, 6 NYCRR 617.8 [e][1][ii]). It also determined that no further proceedings pursuant to the New York State Environmental Quality Review Act (hereinafter SEQRA) (*see*, ECL article 8) were required.

In January 1990 the Town, in furtherance of its remedial plan, awarded Clarkstown Recycling Center, Inc. (hereinafter Clarkstown Recycling) the contract for construction and operation of the Town transfer station. Pursuant to the contract with Clarkstown Recycling, the Town is obligated to deliver to the transfer facility a specified annual tonnage of acceptable waste, and the Town must pay Clarkstown Recyling a penalty if less than the specified amount of waste is delivered. Apparently in accordance with a Town resolution, Clarkstown Recycling is permitted to charge haulers $81 per ton to dispose of solid waste, without regard to its point of origin. After five years, the Town may acquire the facility for $1. Various site and other approvals were issued by the DEC and, in December 1990 the DEC issued a permit authorizing Clarkstown Recycling to operate a solid waste transfer station at the Route 303 site and, in that regard, to accept, exclusive of source-separated recyclables, up to 600 tons of solid waste per day and to conduct limited recycling activities. The initial expiration date on the Clarkstown Recycling transfer station permit is December 31, 1995.

In addition, the Town, pursuant to its remedial plan, amended its zoning code to provide that the Town shall have only one designated "transfer station", which it defined as "an area of land upon which is located * * * structures, machinery and/or other devices where any solid waste * * * is taken from a collection vehicle and placed either upon the land, into any other transportation unit, or into any other device for future movement to another location" (*see*, Town of Clarkstown Zoning Code § 106-3). The zoning code was also amended to define a "[r]ecycling [f]acility" as "[a]n area of land upon which is located, permanently or temporarily, structures, machinery, and/or other devices which are utilized to separate, process, modify, convert, treat, boil, compact or prepare solid waste * * * so * * * any component part of same may be recovered".

In addition to amending its zoning ordinance, the Town enacted Local Laws 1990, No. 9 of the Town of Clarkstown, governing "Solid Waste Transportation and Disposal". Its stated purpose is to ensure that all solid waste "within or generated within the Town" other than sludge and certain hazardous and pathological wastes which could not be disposed of within the Town, is delivered to the Town's "solid waste" facility located at the Route 303 site or to a Town-approved recycling center (Local Laws, 1990, No. 9 of the Town of Clarkstown, § 2[A]). The local law specifically requires that all acceptable solid waste generated within the Town must "be transported and delivered" to the Route 303 facility or to Town-approved recycling centers and that "as to" solid waste brought to a recycling center, the unrecycled residue "shall be disposed of" at the Town's "solid waste facility", except "for recyclable materials which are separated from solid waste at the point of origin or generation of such solid waste, which separated recyclable materials may be transported and delivered facilities within the Town as aforesaid, or to sites outside the Town" (Local Laws, 1990, No. 9 of the Town of Clarkstown, § 3[A], [B], [C]). The local law separately provides that it is unlawful to import waste from outside the Town and "dump same" on property within the Town (*see*, Local Laws 1990, No. 9 of the Town of Clarkstown § 5[B]),

but waste generated outside the Town is otherwise to be handled in the same manner as waste generated in the Town, and, in that regard, the local law renders it unlawful within the Town to "dispose" or "attempt to dispose" of solid waste generated or collected outside the Town except for waste "disposed of" at the Town-operated facility and except for recyclables brought to a recycling center established by special permit (Local Laws, 1990, No. 9 of the Town of Clarkstown § 5[A]). Finally, the local law provides for the adoption by resolution "from time to time" as to fees to be collected at Town facilities (*see*, Local Laws, 1990, No. 9 of the Town of Clarkstown, § 6), but there is nothing to suggest, and no claim is made in this action, that point of origin has any bearing on the fees to be collected.

By order dated February 27, 1991, as a result of litigation which is not presently before us, the Supreme Court directed the Town to issue to the appellant C&A a special permit, subject to reasonable conditions, authorizing it to operate a recycling center at the Western Highway site. In March 1991 a tractor-trailer containing 23 bales of solid waste became disabled following an accident on the Palisades Interstate Parkway. On-site police investigation revealed that the vehicle, which bore an Ohio registration, contained household-type garbage originating within the Town, within a neighboring Town, and in New Jersey, that the shipper was the appellant C&A, and that the destination for the 46,440-pound-load was Wabash, Indiana. Town police thereafter observed other tractor trailers entering and leaving the Western Highway premises, and those vehicles proved to hold solid waste, not recyclable materials, originating within and outside the Town and headed for locations in Illinois, Indiana, West Virginia and Florida.

The Town immediately commenced the instant action for a permanent injunction prohibiting violations of Local Laws 1990, No. 9 of the Town of Clarkstown and simul-

taneously sought a preliminary injunction, urging that the appellants' conduct was depriving the Town of thousands of dollars daily in uncollected revenues. Shortly thereafter, and before answering in this litigation, the corporate appellants commenced an action in the United States District Court for the Southern District of New York for injunctive relief and damages. They, too, sought a preliminary injunction. The District Court (Brieant, J.), by order dated July 11, 1991, dismissed all the antitrust claims on the merits but preliminarily enjoined the Town from enforcing Local Laws 1990, No. 9 of the Town of Clarkstown, except insofar as it concerned solid waste generated solely within the Town, on the ground that the corporate appellants had demonstrated a likelihood of establishing that the local law constitutes an unreasonable, discriminatory, and impermissible burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

Four days later, on July 15, 1991, the Supreme Court, acting upon the parties' stipulation to treat the Town's motion for a preliminary injunction as one for summary judgment, declined to dismiss the action on constitutional grounds as requested by the appellants, and granted the Town summary judgment. By judgment dated July 31, 1991, the court declared that Local Laws, 1990, No. 9 of the Town of Clarkstown is valid, ruled that the appellants are in violation thereof, and permanently enjoined them from operating their businesses at the Western Highway site in violation of the local law and in violation of Town of Clarkstown Code chapter 106. The Federal action was thereafter discontinued.

Although the appellants have urged, somewhat inconsistently, that they are operating only a recycling center, and, by implication, that they are not violating any Town law, they contend here, as they did before the Supreme Court, *inter alia*, that the local law violates the Commerce Clause of the United States Constitution (*see*, US Const,

art I, § 8), that the application of the local law as applied to them constitutes a taking of property in violation of the Due Process Clauses of the New York State and United States Constitutions (*see*, US Const, 5th, 14th Amends; NY Const, art I, § 7), that the local law was enacted for economic rather than public health and welfare reasons and was therefore beyond the scope of the Town's police powers, and that the local law was enacted in violation of SEQRA (*see*, ECL art 8) because no negative or other declaration was filed with respect to its enactment. We note that the appellants interpose no direct challenge to Town of Clarkstown Code chapter 106 on the ground that it permits only one transfer station within the Town. The appellants make no claim that their existing facility constitutes a legal nonconforming use (*cf., Town of Islip v. Zalak*, 165 AD2d 83; *Niagara Recycling v. Town Bd. of Niagara*, 83 AD2d 316; *see also, Moran v. Village of Philmont*, 147 AD2d 230, 234). Perhaps because of the lapse of time (*see*, CPLR 217), the appellants do not challenge on appeal the negative declaration issued in June 1989 when construction of the Town's transfer station was made part of the Town's remedial plan.

We agree with the Supreme Court that the appellants have no standing to challenge the adequacy of the Town's environmental review. Although the appellants' economic concerns do not deprive them of standing to also complain of environmental injury (*see, Society of Plastics Indus. v. County of Suffolk*, 77 NY2d 761, 777), the appellants are aggrieved only economically by the enactment of the local law (*see, Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency*, 76 NY2d 428). Neither that economic injury, nor the status of C&C as an owner of property within the Town, is sufficient under the facts of this case to confer standing on the appellants to challenge the Town's failure to separately issue environmental declarations with respect to that part of the Town's remedial plan which requires that all solid waste which is

processed or handled within the Town be processed or handled at the Town's transfer station (*see, Matter of Mobil Oil Corp. v. Syracuse Indus. Dev. Agency, supra*; *cf.*, 6 NYCRR 617.13[d][15]; *Montes Waste Sys. v. Town of Oyster Bay*, 150 Misc 2d 109). We note, moreover, that the record demonstrates that the overall plan was the subject of adequate environmental review (*see, Matter of Har Enters. v. Town of Brookhaven*, 74 NY2d 524; *cf., Montes Waste Sys. v. Town of Oyster Bay, supra*).

The appellants' claim that the enactment of the local law was financially motivated and thus beyond the scope of the Town's police powers is without merit. Local governments have long been authorized to enact laws relating to the "safety, health and well-being of persons or property" (NY Const, art IX, § 2[c][10]) and it is well settled that the regulation of solid waste collection and disposal, a function traditionally entrusted to State and local governments (*see, e.g.*, Town Law §§ 130[6], 136[8], 198[9], 221), is fundamentally related to the public health and welfare (*see e.g., Monroe-Livingston Sanitary Landfill v. Town of Caledonia*, 51 NY2d 679; *Town of Islip v. Zalak, supra*). Municipalities have thus heretofore been empowered to ban dumping (*see, Wiggins v. Town of Somers*, 4 NY2d 215), to grant exclusive franchises for the collection of disposal of waste (*see, City of Rochester v. Gutberlett*, 211 NY 309), and to prohibit outright the establishment of commercial and private disposal facilities (*see, Monroe-Livingston Sanitary Landfill v. Town of Caledonia, supra*; *Town of LaGrange v. Giovenetti Enters*, 123 AD2d 688).

More recent legislative responses (*see, e.g.*, L 1983, ch 544; L 1988, ch 70; L 1991, ch 569) to what has become a national crisis (*see*, Weinberg, 1989 Supplementary Practice Commentary, McKinney's Cons Laws of NY, Book 17½, ECL 27-0106, 1992 Cumulative Annual Pocket Part, at 145), while obviously fostering State-wide or regional approaches designed to encourage "economical"

projects for present and future waste collection (*see*, ECL 27-0101[1]), also contemplate and encourage the active involvement of local governments in the development of local solutions and local plans such as that adopted here by the Town and approved by the DEC (*see*, ECL 27-0103, 27-0107; *cf.* Town Law § 221). A concern for the continued economic viability of a solid waste management facility established pursuant to such a plan does not negate or detract from, but in fact is a part of the health, safety, and environmental concerns such plan is designed to address (*see*, *Town of North Hempstead v. Village of Westbury*, —— AD2d —— [2d Dept., Aug. 17, 1992]). Indeed, like the enabling legislation (*see*, L 1983, ch 544) concerning solid waste management in the Town of North Hempstead which we have recently upheld (*Town of North Hempstead v. Village of Westbury*, *supra*), the newly-enacted "Holland-Gromack" law (*see*, L 1991, ch 569) authorizes municipalities within the County of Rockland to adopt local laws which impose "appropriate and reasonable limitations on competition" in solid waste management, *inter alia*, by requiring that all solid waste generated or brought within their boundaries be delivered to specified facilities, thus confirming the "governmental and public purpose" of "displacing competition" so that public welfare rather than profit is the focus of solid waste management. The appellants have thus failed to sustain their heavy burden of demonstrating that the economic aspects of the Town's remedial plan render Local Laws, 1990, No. 9 of the Town of Clarkstown an unconstitutional exercise of the Town's police power.

That enactment of Local Laws, 1990, No. 9 of the Town of Clarkstown is within the scope of the Town's police power does not end our inquiry. As noted, the appellants also urge that the local law constitutes an unreasonable, discriminatory burden on interstate commerce and that its application as to them constitutes an unlawful taking of property, violating their constitutional rights of due process of law. But while neither argument is without

merit, neither justifies the extraordinary step of invalidating the local law (*see*, *41 Kew Gardens Rd. Assocs. v. Tyburski*, 70 NY2d 325, 333; *Lighthouse Shores v. Town of Islip*, 41 NY2d 7; *see also*, *St. Aubin v. Flacke*, 68 NY2d 66; *cf.*, *Fred F. French Investing Co. v. City of New York*, 39 NY2d 587, 595).

It is now beyond dispute that "garbage" is an article of commerce within the meaning of the Commerce Clause of the United States Constitution (*see*, *Philadelphia v. New Jersey*, 437 US 617). It is also well settled that neither the several states nor their municipalities may isolate themselves from a solid waste problem common to all the states by erecting discriminatory barriers to the free flow of commerce (*see*, *City of Philadelphia v. New Jersey*, *supra*; *Chemical Waste Management v. Hunt*, —— US —— [June 1, 1992]; *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, —— US —— [June 1, 1992]; *see also*, *Dutchess Sanitation Serv. v. Town of Plattekill*, 51 NY2d 670). However, the Commerce Clause protects the interstate market, not particular interstate firms (*see*, *Exxon Corp. v. Governor of Maryland*, 437 US 117, 127-128), and the "simple answer to [the appellants'] argument is that the legislation does not discriminate against interstate commerce" (*Niagara Recycling v. Town of Niagara*, *supra*, at 332) because, unlike State or local legislation at issue in most of the cases on which the appellants rely (*see*, *e.g.*, *Chemical Waste Management v. Hunt*, *supra*; *Fort Gratiot Sanitary Landfill v. Michigan Dept. of Natural Resources*, *supra*; *Philadelphia v. New Jersey*, *supra*; *Dutchess Sanitation Serv. v. Town of Plattekill*, *supra*), the local law in issue here imposes no special fees, taxes, prohibitions, or duties on those transporting out-of-state articles of commerce. Rather, the local law applies evenhandedly to all solid waste processed within the Town, regardless of point of origin (*see*, *Exxon Corp. v. Governor of Maryland*, *supra*; *Head v. New Mexico Bd. of Examiners in Optometry*, 374 US 424; *Huron Portland Cement Co. v.*

City of Detroit, Michigan, 362 US 440, 442, 448; *J. Filiberto Sanitation v. New Jersey Dept. of Envl. Protection*, 857 F2d 913) Moreover, were we to assume that the presently-existing $11 difference between the Town tipping fee and the fee the appellants have chosen to impose has any effect on the interstate flow of solid waste (*cf., Monroe-Livingston Sanitary Landfill v. Town of Caledonia, supra*, at 684; *Town of LaGrange v. Giovenetti Enterprises, supra*; *bui see, J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Envl. Protection, supra*, at 922), there is no evidence before us which suggests that what can have nothing more than an incidental effect on interstate commerce is impermissibly burdensome (*see, Exxon Corp. v. Governor of Maryland, supra*, at 127-128; *see also J. Filiberto Sanitation v. New Jersey Dept. of Envl. Protection, supra*), particularly when the "burden" is weighed against the legitimate and significant public concerns underlying the local law (*cf., Pike v. Bruce Church, Inc.*, 397 US 137, 142; *see, J. Filiberto Sanitation v. New Jersey Dept. of Envl. Protection, supra*, at 915).

The ruling by the United States District Court for the Southern District of New York on the corporate appellants' motion for a preliminary injunction does not require that we rule in their favor here (*cf., Guggenheimer v. Ginzburg*, 43 NY2d 268, 272; *Niagara Recycling v. Town of Niagara, supra*, at 324), and we conclude that the appellants' interstate commerce claim is insufficient to justify denying the Town summary judgment (*see, J. Filiberto Sanitation v. New Jersey Dept. of Envl. Protection, supra*).

Although the appellants have not established the existence of an issue as to whether Local Laws, 1990, No. 9 of the Town of Clarkstown impermissibly burdens interstate commerce, the potential effect on their business does require that we review their claim that the local law works as a taking violative of their due process rights (*see, e.g., Birnbaum v. State of New York*, 73

NY2d 638; *Rochester Gas & Elec. Corp. v. Public Serv. Comm. of State of N.Y.*, 71 NY2d 313; *Niagara Recycling v. Town of Niagara, supra*; *cf., Town of Islip v. Zalak, supra*). However, the appellants may operate a recycling facility at the Western Highway site. Further, they do not directly claim, and the record does not suggest, that Local Laws 1990, No. 9 of the Town of Clarkstown deprives the appellants of all economically viable uses of the Western Highway property held by the appellant C&C (*see generally, Lucas v. South Carolina Coastal Council*, —— US —— [June 29, 1992]; *St. Aubin v. Flacke, supra*; *French Investing Co. v. City of New York, supra*; *cf., Town of Islip v. Zalak, supra*). Furthermore, while the appellants may have had some vested interest in the permit to operate a transfer station at the Western Highway site (*see, Niagara Recycling v. Town of Niagara, supra*; *cf., Allied Grocers Cooperative v. Tax Appeals Tribunal*, 162 AD2d 791), the expiration of that permit on July 31, 1992, renders moot any claim that the local law retrospectively diminished or retroactively invalidated vested rights. In light of the close relation of the local law to the promotion of health, safety and welfare of society (*see, Niagara Recycling v. Town of Niagara, supra*; *see also, Empire State Assn. of Adult Homes v. Perales*, 139 AD2d 41, 44; *Moran v. Village of Philmont*, 147 AD2d 230, *supra*; *J. Filiberto Sanitation v. New Jersey Dept. of Envl. Protection, supra*), the acute public interest in the proper and safe management of solid waste (*cf., e.g., Niagara Recycling v. Town of Niagara, supra*, at 327; *see, J. Filiberto Sanitation v. New Jersey Dept. of Envl. Protection, supra*), the appellants' obvious knowledge that their business was and would be increasingly heavily regulated (*cf., Birnbaum v. State of New York, supra*), and the appellants' heavy burden of overcoming the presumption of constitutionality which attaches to the local law (*St. Aubin v. Flacke, supra*, at 76; *French Investing Co. v. City of New York, supra*; *cf., Lighthouse Shores v. Town of Islip*, 41 NY2d 7, *su-*

pra), there are no issues of fact warranting trial of the appellants' due process claims. In fact, what emerges from the appellants' multi-pronged challenge to Local Laws, 1990, No. 9 of the Town of Clarkstown is a singular complaint that its enactment adversely affects competition in the solid waste industry (*but see, Exxon Corp. v. Governor of Maryland, supra*, at 129-134), a claim the appellants unsuccessfully pressed in the United States District Court. That claim does not include a challenge to the validity of the "Holland-Gromack" law which confirms the Town's authority to limit or displace competition (*see*, L 1991, ch. 569) and the constitutionality of which in any event is not before us (*see*, CPLR 1012[b]; *Jefferds v. Ellis*, 122 AD2d 595). Under the circumstances, we uphold Supreme Court's determination granting the Town summary judgment.

The appeal from the order dated July 15, 1991, is dismissed because the right of direct appeal therefrom terminated with the entry of the judgment in the action (*see, Matter of Aho*, 39 NY2d 241, 248). The issues raised on appeal from the order are brought up for review and have been considered on the appeals from the judgment (*see*, CPLR 5501[a][1]), and the order dated September 16, 1991, made upon reargument. Further, the appeal from the judgment is dismissed, since it was superseded by the order dated September 16, 1991. The order dated September 16, 1991, is affirmed insofar as appeal from.

THOMPSON, J.P., BRACKEN and MILLER, JJ., concur.

ORDERED that the appeal from the order dated July 15, 1991 is dismissed; and it is further,

ORDERED that the appeal from the judgment dated July 31, 1991, is dismissed as the judgment was superseded by the order dated September 16, 1991, made upon reargument; and it is further,

ORDERED that the order dated September 16, 1991, is affirmed insofar as appealed from; and it is further,

ORDERED that the respondent is awarded one bill of costs.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

APPENDIX B

SUPREME COURT—
STATE OF NEW YORK

Trial Special Term Part—Rockland County

PRESENT: HON. ROBERT J. STOLARIK, JUSTICE

Index Number 1549 1991

Motion Date August 16, 1991

Motion Cal. Number 8

THE TOWN OF CLARKSTOWN,
Plaintiff,

—against—

C&A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C&C REALTY, INC., ANGELO CARBONE and "JOHN DOE 1 through 6",
Defendants.

[September 16, 1991]

		Papers Numbered
Notice of Motion/Order to Show Cause—Affidavits	defendants	1
	plaintiff	2
Answering Affidavits	defendants	3, 4
Replying Affidavits	plaintiff	5
Affidavits Filed Papers memorandum of law—	defendants	6
memorandum of law—	plaintiff	7

Upon the foregoing papers it is ORDERED that this motion for reargument is granted and upon reargument the Court adheres to its original determination. The findings herein are deemed to be incorporated in the Court's decision and order dated July 15, 1991.

Defendants make three arguments with respect to reargument, that the Court failed to provide "due and great respect" to a prior Federal Court decision of July 11, 1991, that the Court failed to consider the "balancing test" with respect to interstate commerce and that the recently passed Holland/Gromack bill deprives the plaintiff of the authority to enact the provisions of Local Law No. 9.

Holland/Gromack Bill

A reading of the Holland/Gromack bill reveals that it recognizes the authority of local municipalities to adopt "local laws, ordinance and regulations . . . . to displace competition". In addition, the Holland/Gromack bill specifically recognizes the authority of the County of Rockland and its municipalities to require that ". . . . all solid waste generated, originated *or brought within their respective boundaries* . . . . shall be delivered to a specified solid waste management-resource recovery facility . . . ." [Emphasis supplied]. Defendants' contention that the Holland/Gromack bill deprives Clarkstown of the power to enact Local Law No. 9 constitutes a misreading of its provisions.

Due & Great Respect

On July 11, 1991, the United States District Court, Southern District of New York granted a preliminary injunction preventing enforcement of the provisions of Local Law No. 9, finding that defendants herein had demonstrated a likelihood of success upon the merits of the commerce clause issue. On July 15, 1991, this Court granted summary judgment finding there was no legal merit to defendants' contention that Local Law No. 9

violated the commerce clause. Prior to rendering its July 15, 1991 decision and order, this Court reviewed the July 11, 1991 Southern District decision to determine whether there was any res judicata/collateral estoppel effect. Since the Federal decision contained no findings on the merits, this Court was not bound by its determination and proceeded to determine the merits of the defendants' commerce clause claim.

There is no legal basis for an assertion that this Court should have deferred to the Federal Court's preliminary injunction decision.

Commerce Clause

When defendants assert that a local ordinance is unconstitutional, they are faced with an "exceedingly strong presumption of constitutionality". Although this "presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt". *Stepping Stone Associates v. City of White Plains* 100 AD2d 619, 620; affd. 64 N.Y. 2d 690; Statutes, § 150 subd.(b).

In litigating the motion for summary judgment, both parties were required to avoid conclusory allegations and come forward to lay bare their proof, *Hanson v. Ontario Milk Producers Corp., Inc.*, 58 Misc. 2d 138. Defendants' failure to respond to the factual allegations contained in the plaintiff's moving papers constituted an admission of the facts contained therein. *Kuchne v. Nagel Inc. v. Baiden* 36 NY2d 539.

Defendants' papers contained only conclusory allegations. They failed to provide the Court with any evidentiary facts concerning the nature of their alleged interstate commerce activities. A reading of the July 15, 1991 decision which expressed concern about the source of defendants' solid waste should have made this apparent to the defendants. Faced with the heavy burden of demonstrating unconstitutionality, the defendants were required

to lay bare their proof and inform the Court of the details of their "interstate" operations. This Court again refers defendants to the uncontroverted evidentiary facts in the plaintiff's moving papers, i.e. that defendants' "interstate" refuse is being transported from Bergen County, New Jersey in violation of New Jersey law, which requires that Bergen County refuse be taken to the Bergen County transfer station.

Plaintiffs presented uncontroverted evidence of defendants' violation of Local Law No. 9 whereas defendants simply presented the Court with the conclusory allegation that Local Law No. 9 was "per se" violative of the provisions of the commerce clause.

Defendants now allege that the Court should have applied the "balancing test" of *Pike v. Bruce* 397 US 137. The application of such a test results in the same conclusion. Defendants have failed to demonstrate with evidentiary facts that the burden imposed on interstate commerce, if any, is "clearly excessive in relation to the putative local benefits." *Pike*, supra, 142. The legitimate local purpose of Local Law No. 9 is the regulation and control of solid waste disposal within the Town of Clarkstown. Having found a legitimate "local purpose", the Court is required to apply a balancing test comparing the extent of the burden on interstate commerce with the nature of the local interest involved. Defendants have, however, provided the Court with very little information regarding the alleged burden Local Law No. 9 imposes on interstate commerce. The $11.00 per ton cost differential between defendants' present operation which bypasses plaintiff's transfer station and the requirement of Local Law No. 9, which requires that defendants transport the "residue" from their recycling operation to the plaintiff's designated transfer facility does not, by itself, constitute a sufficient burden on interstate commerce to render the Local Law unconstitutional. "Cost taken into consideration with other factors might be relevant in some

cases to the issue of burden on commerce." *Bibb v. Navajo Freight Lines* 359 U.S. 520, 526. In the instant case, defendants have failed to inform the Court of any other effect which Local Law No. 9 has on interstate commerce. Defendants have failed to demonstrate factually the extent to which their operation or the operation of out-of-state entities with whom they are doing business, are being affected by this Local Law. In *Pike v. Bruce Church*, supra, 1 at 177, the fruit growing company which was contesting the Arizona regulation, clearly demonstrated that compliance with the regulation would cause the company to construct a $200,000.00 packing facility which would take many months to construct. The Supreme Court found that the imposition of such a heavy burden on the company was excessive when compared with the purpose for which the regulation was enacted, i.e., to promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging. In *Bibb*, supra, 527-528, the interstate freight shippers made a significant factual showing of how the Illinois truck mudguard requirement seriously interfered with the operations of motor carriers.

The purpose underlying the local regulation is far more compelling than the purpose of the Arizona regulation. The instant regulation is directly related to the control and regulation of solid waste disposed within the Town of Clarkstown.

Dated September 16, 1991

/s/ Robert J. Stolarik
ROBERT J. STOLARIK, J.S.C.

TO: Richard A. Glickel, Esq.
Special Counsel to
Murray N. Jacobson, Town Attorney
Attorney for Plaintiff
Centerock East—Suite 205
Two Crosfield Avenue
West Nyack, NY 10994

Granik Silverman Sandberg Campbell
Nowicki Resnik
Attorneys for Defendants
254 S. Main Street
New City, NY 10956-0370

APPENDIX C

SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF ROCKLAND

Index No. 1549/91

Mot. Date: 4/19/91

Mot. Cal. No. 8

THE TOWN OF CLARKSTOWN,
Plaintiff,

-against-

C&A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C&C REALTY, INC., ANGELO CARBONE and "JOHN DOE 1 through 6",
Defendants.

[July 15, 1991]

DECISION AND ORDER

STOLARIK, J.,

This is an action by the plaintiff seeking a permanent injunction prohibiting the defendants (1) from operating a transfer station at 183 Western Highway, West Nyack, New York, (2) from unlawfully disposing of solid waste in violation of the provisions of Clarkstown Local Law #9 of 1990 and (3) from conducting illegal business operations at 183 Western Highway.

This was originally a motion for a preliminary injunction, but the parties have stipulated to permit the Court to treat this as a motion for summary judgment. The Court has afforded both parties the opportunity to submit additional affidavits, evidence and memoranda of law.

Chapter 106 of the Clarkstown Zoning Code provides that there shall be only one lawfully designated "transfer station" for the Town of Clarkstown. A "transfer station" is not a permitted use under the zoning code, other than the Town's own facility. The Town Zoning Code defines a "transfer station" as "an area of land upon which is located, permanently or temporarily, structures, machinery and/or other devices where any solid waste, refuse, leaves, trash, trees or soil is taken from a collection vehicle and placed either upon the land, into any other transportation unit or in any other device for future movement to another location." Clarkstown Zoning Code § 106-3. p. 10620.

New York State regulations define a "transfer station" as "a solid waste management facility, other than a recyclables building and recovery facility exclusively handling nonputrescible recyclables, that can have a combination of structures, machinery or devices, where solid waste is taken from collection vehicles and placed in other transportation units for movement to another solid waste management facility". 6 NYCRR § 360-1.2,(b)(157).

The Town Zoning Code defines a "recycling facility" as "An area of land upon which is located, permanently or temporarily, structures, machinery and/or other devices which are utilized to separate, process, modify, convert, treat, boil, compost, compact or prepare solid waste, refuse, leaves, trash, trees or soil, so thus any component part of the same may be recovered." Clarkstown Zoning Code § 106.3, p. 10615.

"Recyclables" are defined as "solid waste that exhibits the potential to be used repeatedly in place of virgin material." 6 NYCRR § 360-1.2(b)(120).

A "recyclables handling and recovery facility" is a "solid waste management facility, other than collection and transfer vehicles, at which recyclables are separated from the solid waste stream, or at which previously sepa-

rated recyclables are collected." 6NYCRR § 360-1.2(b)(121).

A "solid waste management facility" is "any facility employed beyond the initial solid waste collection process and managing solid waste including but not limited to: storage areas or facilities; transfer stations; . . . . recyclables handling and recovery facilities." 6 NYCRR § 360-1.2 (b)(145).

Local Law No. 9 of the Town of Clarkstown enacted on December 31, 1990, provides as follows:

"Section 3.

C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility located at Route 303, West Nyack, New York or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code, except for recyclable materials which are separated from solid waste at the point of origin or generation of such solid waste, which separated recyclable materials may be transported and delivered to facilities within the Town as aforesaid, or to sites outside the Town. As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown.

D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than the facilities or sites set forth in Paragraph "C" above.

Section 5. Acceptable and Unacceptable Waste Generated Outside the Town of Clarkstown.

A. It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable

waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pursuant to agreement with the Town of Clarkstown and recyclables, as defined in Chapter 82 of the Clarkstown Town Code, brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code."

"Residue" is defined as all solid waste remaining after treatment and, includes but is not limited to ash residue and other solid waste which is not recovered or combusted. 6NYCRR § 360-1.2(b)(129).

The planning, approval and construction of the Town's solid waste management facility (transfer station) was a result of the forced closure of the Clarkstown landfill by the New York State Department of Environmental Conservation. By DEC order of August 7, 1989, the town was required to construct and operate a solid waste transfer station at the site of its old landfill. The Town prepared a full Environmental Assessment Form (EAF) and a negative declaration was adopted by the Town Board on June 21, 1990 with regard to the construction of the proposed transfer station. Following a review of proposals, the Town selected Clarkstown Recycling Center, Inc. to operate its transfer station. As part of its contractual arrangement with Clarkstown Recycling, the Town is committed to provide a minimum tonnage of solid waste to the town transfer station. The failure to deliver this minimum amount of solid waste would result in the payment of a monetary penalty by the Town.

The intent and purpose behind the Town's solid waste regulatory scheme is expressed in Local Law #9 of 1990, Section 2, paragraphs I and II. Clarkstown seeks to provide for the transportation and disposition of all acceptable solid waste generated within or brought into the Town at the Clarkstown solid waste facility (transfer station) or at any other facilities in the Town which are

approved for recycling, processing or other disposition or handling. The Town law was enacted to benefit the health, welfare and safety of the Town residents as an essential and proper exercise of its governmental functions.

The instant dispute originated from a tractor trailer accident which occurred on the Palisades Interstate Parkway (PIP) on March 9, 1991. A tractor trailer containing 23 bails of solid waste consisting of household garbage originating from Clarkstown, Orangetown, Nyack and Bergen County, New Jersey became disabled after striking the Route 59 overpass. On March 11 and 12, 1991, the Clarkstown Police seized six other trailers that had departed the defendants' Western Highway facility. The contents of these trailers were inspected at the Clarkstown transfer station and found to contain solid waste which had originated both within and without Clarkstown, not recyclables. (Plaintiff seized and inventoried the contents of these trailers to determine the source of the solid waste. Defendants do not dispute the results of plaintiff's inventory).

Plaintiffs contend that defendants are operating an illegal transfer station at the Western Highway facility. Defendants contend that they are operating a "recycling facility". Defendants allege that they receive waste at this facility from both out-of-state (defendants do not disclose the specific source of the out-of-state waste.) as well as parts of New York outside the Town of Clarkstown. After receiving the waste, it is "shaken down" or separated, the recyclables are removed and the remaining waste left after separation is shipped by ICC licensed truckers to the midwest and south to landfills, resource recovery sites and other disposal facilities in Ohio, Delaware, Pennsylvania, Kentucky, Indiana and Florida. Defendants process and ship over 150 tons of waste per week.

Based upon defendants' admission and the uncontroverted evidence herein, it is apparent that solid waste

originating in Clarkstown has been delivered to and shipped from the defendants' Western Highway facility, bypassing the Clarkstown transfer station in violation of the provisions of Local Law #9 of 1990, Section 3(C). In addition, defendants are admittedly not transporting the solid waste "residue" that results from the operation of their Western Highway facility to the Town transfer station as required by the provisions of Local Law #9 of 1990, Section 5(A).

Accordingly, if the Clarkstown statutory scheme is valid and constitutional, the plaintiffs would be entitled to a permanent injunction restraining defendants from operating in violation of the provisions of Local Law #9 of 1990.

However, defendants have interposed numerous defenses and a counterclaim which must be determined prior to the granting of any injunctive relief. The Court will discuss each of these, seriatim.

The Court should also note that defendants do not contest the validity of the Clarkstown Zoning ordinance which bars the operation of commercial solid waste transfer stations. (See *Town of LaGrange v. Giovenetti Enterprises, Inc.* 123 AD2d 688.)

FAILURE TO COMPLY WITH SEQRA

Defendants, via counterclaim in the nature of Article 78, contend that the Town of Clarkstown failed to comply with SEQRA prior to enacting the provisions of Local Law #9 of 1990.

The Court finds that defendants lack standing to challenge the Town's SEQRA compliance. "To qualify for standing to raise a SEQRA challenge, a party must demonstrate that it will suffer an injury that is environmental and not solely economic in nature". *Mobil v. Syracuse Indus. Dev.* 76 NY 2d 428, 433, *Society of Plastics v. Suffolk* 77 NY2d 761, 777. At best, defendants have

demonstrated an injury that is economic in nature. They have made no attempt to indicate how the challenged Clarkstown waste disposal regulation scheme will harm the environment. In fact, it would appear that the regulatory scheme restricts the number of transfer/recycling stations and their methods of operation in a manner that would be beneficial to the environment.

However, even if defendants had standing to litigate the SEQRA issue, there is no merit to their contention that Clarkstown violated SEQRA in adopting Local Law #9 of 1990. As long as the proper SEQRA proceedings were followed in procuring the permit for the transfer station, and defendants do not contend they were not strictly followed, the passage of Local Law #9 of 1990 would constitute an exempt or Type II Action as "routine or continuing agency administration and management, not including new programs or major reordering of priorities." 6 NYCRR § 617.13[d][15]. The same conclusion was reached in *Vinnie Montes Water System v. Oyster Bay* 567 NYS2d 335, 337 (Sup. Ct. Nassau Cty. Jan. 1991) where a resolution designating an existing and properly authorized facility at an already established waste disposal site as the exclusive transfer station for Oyster Bay was held to be an exempt Type II action. As in the instant case, the Town of Oyster Bay had issued a negative declaration in conjunction with its initial application for a permit to operate the transfer station. Otherwise stated, the environmental impact of ". . . the overall project was comprehensively reviewed in conjunction with the permit approval for construction of the proposed solid waste transfer facility." *Vinnie Montes, supra* at 337.

BURDEN ON INTERSTATE COMMERCE

Defendants contend that the provisions of Local Law #9 of 1990 insofar as they require the "residue" of recycling operations for garbage originating within or without the Town of Clarkstown to be transferred to the

Clarkstown transfer station are violative of the interstate commerce clause (U.S. Const., Art. 1, § 8, cl.3).

There is no question that solid waste is an article of interstate commerce. *City of Philadelphia v. New Jersey* 437 US 617, 621-623. A reading of "commerce clause" cases indicates that the Supreme Court has been attentive to schemes which provide for economic isolation and protectionism, "while at the same time recognizing that incidental burdens on interstate commerce may be unavoidable when a state legislates to safeguard the health and safety of its people. Id. at 623-24. States clearly retain authority under the general police powers to regulate matters of "legitimate local concern" in spite of the effect it might have on interstate commerce. *Lewis v. B.T. Inv. Manager, Inc.* 447 US 27, 36.

Defendants contend that Local Law #9 affects both waste originating outside the State of New York and waste intended to be shipped outside New York State, thereby creating a barrier to an existing flow of interstate commerce. Defendants claim Local Law #9 constitutes "economic isolation" and protectionism by blocking the flow of interstate commerce at the New York border.

The Court finds defendants' arguments with respect to the commerce clause to be without merit. Local Law #9, unlike the New Jersey statute in *City of Philadelphia*, supra or the Town of Platekill ordinance in *Dutchess Sanitation Service v. Platekill* 51NY2d 670, does not discriminate against out-of-state waste. Local Law #9 provides equal treatment to out-of-state waste and to waste originating in the Town of Clarkstown. The statutory scheme does not block interstate waste at the New York border, or discriminate against out-of-state waste; it simply mandates that once out-of-state waste arrives within the Clarkstown border, it must be disposed of at the Clarkstown transfer station.

A similar statutory provision was analyzed in *J. Filiberto Sanitation, Inc. v. State of N.J. Dept. of Environ-*

mental Protection 857 F2d 913 (3rd Cir.). In that case, local carters claimed that a New Jersey regulation which required all waste collected in Hunterdon County be delivered to one designated facility for processing and subsequent disposal violated the interstate commerce clause. As in the instant situation, the carters were bypassing the designated transfer station and shipping waste directly to out-of-state facilities where the tipping fees were lower. The U.S. Circuit Court of Appeals found, in spite of the carters' contention that the sole purpose for the Hunterdon regulation was to guarantee profits to the designated transfer station operators, that there was no proof that the rule was protectionist. Rather, it was found that the rule was intended to effect the proper disposition of all trash, the reduction of truck traffic and to permit the governmental entity to enter into and meet long and short term contracts for final disposal. Since the regulation did not place any cognizable burden on interstate commerce, it did not violate the commerce clause.

As the parties attacking the Local Law, defendants bear the burden of showing discrimination. *Hughes v. Oklahoma* 441 US 322, at 336. In the instant case, they have failed to sustain this burden.

The reasoning and rationale of the J. Filiberto case are directly on point. The defendants have failed to demonstrate that Local Law #9 has any "demonstrable effect whatsoever on the interstate flow of goods". *Exxon Corp. v. Governor of Maryland* 437 US 117 at 126 n. 16. Regardless of whether the waste is shipped from the Clarkstown transfer station or the defendants' facility, it is destined for out-of-state landfills. As noted in *J. Filiberto*, supra at 921, a transfer "station is not in competition with out-of-state landfills. On the contrary, the station is their customer." Local Law #9 does not discriminate against interstate solid waste, nor does it favor local interests over those of foreign competitors.

Exxon, supra at 125, *J. Filiberto*, supra at 921. Rather, it treats all waste within the Town of Clarkstown in an evenhanded, equal manner requiring that same be processed at the Clarkstown transfer station for the identical tipping fees.

The economic injury alleged herein is an injury suffered by the in-state defendants not by out-of-state interests who are involved in interstate commerce. In *Exxon*, supra at 127, the Supreme Court rejected the "underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market."

The Court should also note that the uncontroverted evidence indicates that defendants are handling waste from Bergen County, New Jersey at their 183 Western Highway Facility in New York. Defendants do not controvert plaintiff's allegations that the removal of Bergen County waste to New York, bypassing Bergen County's mandatory transfer station is illegal under New Jersey law. (As previously noted, defendants have not chosen to inform the Court of the specific locations of the origin of their out-of-state waste.) However, it would appear that defendants' interstate commerce clause violation is based on the movement of solid waste from Bergen County, New Jersey to New York in violation of New Jersey law.

Otherwise stated, Local Law #9 is not a "protectionist" statute and is therefore not "per se" invalid. Rather, it is a statute which "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental." *Lewis v. B.T. Investment*, supra, p. 36.

DUE PROCESS VIOLATION

Defendants allege that the provisions of Local Law #9 of 1990 effectively puts them out of business in violation of the due process clause of the 5th and 14th Amendments

of the U.S. Constitution. The Court finds this contention to be without merit.

The provisions of Local Law #9 of 1990 do not result in a "taking" of the defendants' business. A "taking" occurs only if:

> the effects of the action are so complete as to deprive the owner of all or most of its interest in the property. *Rochester Gas & Elec. v. PSC* 71 NY 2d 313.

The waste disposal industry is heavily regulated subject to numerous governmental regulations and licensing requirements. *Vinnie Montes Waste System v. Oyster Bay* 567 NYS2d 335, 338. Local Law #9 does not put defendants out of business. Defendants are still permitted to operate a recycling facility and transport solid waste for sorting and separation regardless of origin. Defendants have no property rights vested or otherwise in the continuing operation of their facility or in the profit generated thereby. *Presidents Council of Trade Waste Assn. v. City of N.Y.* 142 Misc 2d 135, aff'd. 159 AD2d 48.

As in *Exxon*, supra at 124, defendants' substantive due process claim in this action fails because the provisions of Local Law #9 of 1990 "bear a reasonable relation" to the Town's legitimate purpose in controlling and regulating solid waste disposal within the confines of the Town.

CONCLUSION

Since the provisions of Local Law #9 of 1990 are neither invalid nor unconstitutional, and the defendants are operating in admitted violation of its provisions, the plaintiff is entitled to injunctive relief.

Submit judgment on notice restraining the defendants from operating in violation of the provisions of Local Law #9 of 1990.

Counsel for all parties are directed to appear for the conduct of a preliminary conference at the undersigned's

chambers, Rockland County Courthouse, Main Street, New City, New York at *9:00 A.M. on Tuesday, August 6, 1991.* Counsel shall be prepared to discuss a timetable for disclosure in this action.

This decision constitutes the order of the Court.

Dated: New City, New York
July 15, 1991

/s/ Robert J. Stolarik
ROBERT J. STOLARIK
J.S.C.

TO: Richard A. Glickel, Esq.
Special Counsel to
Murray N. Jacobson, Town Attorney
Attorney for Plaintiff
Centerock East—Suite 205
Two Crosfield Avenue
West Nyack, NY 10994

Granik Silverman Sandberg
Campbell Nowicki Resnik
Attorneys for Defendants
254 South Main Street
P. O. Box 370
New City, NY 10956-0370

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

91 Civ. 2105 (CLB)

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC. and C & C REALTY, INC.,
Plaintiffs,

-against-

THE TOWN OF CLARKSTOWN and CLARKSTOWN RECYCLING CENTER, INC.,
Defendants.

[July 11, 1991]

MEMORANDUM AND ORDER

Brieant, Chief Judge

On March 27, 1991 plaintiffs commenced this action alleging violations of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. 1, *et seq.*, Section 4 of the Clayton Act, 15 U.S.C. § 15, *et seq.*, and Section 1983 of the Civil Rights Act of 1964, 42 U.S.C. § 1983. Plaintiffs seek injunctive relief and damages for injury to their business.

This Court has subject matter jurisdiction over the claims set forth in the complaint pursuant to Sections 1331, 1337 and 1343 of Title 28 of the United States Code. Since plaintiffs and defendants have their office and principal place of business in Clarkstown, New York, venue in this district is appropriate. 28 U.S.C. § 1391(c).

On June 5, 1991, the Court heard oral argument on (1) plaintiffs' motion for an Order of this Court granting a preliminary injunction against the enforcement of Local Law No. 9 of 1990 as adopted by the Town of

Clarkstown and (2) defendant Town of Clarkstown's motion to dismiss the complaint pursuant to Rule 12(b)(6) and/or for summary judgment pursuant to Rule 56 or, in the alternative, to dismiss or stay this case on abstention grounds. Both motions were marked fully submitted decision reserved on the same date.

The underlying facts are not in dispute. Plaintiffs are engaged in the business of recycling and solid waste disposal. Solid waste is brought to their facility in Clarkstown from both within and without New York State. This solid waste is processed for $70 per ton and that which is recyclable is baled or otherwise packaged and sold to facilities outside New York state. The remaining solid waste is baled and sold to "resource recovery centers" (or facilities which burn the solid waste to create power) or placed in landfills outside Clarkstown.

On August 7, 1989, Clarkstown entered into a consent order with the New York Department of Environmental Conservation which required the town to cease operations at its own landfill and establish a transfer station as an alternative method of managing the solid waste in the town. *See* Doc. No. 8, Ex. A. Thereafter, the town entered into an agreement with defendant Clarkstown Recycling whereby Clarkstown Recycling would build a transfer station facility and the town, in turn, would guarantee a certain amount of tonnage or suffer a penalty. *See* Doc. No. 9, Ex. A. Pursuant to the terms of this exclusive arrangement, Clarkstown Recycling is permitted to charge haulers $81 per ton to dispose of any and all solid waste that enters the territorial limits of Clarkstown, without regard to whether that solid waste is generated within or without Clarkstown. The agreement also provides that when the arrangement expires in five years, the Town can acquire the facility for $1.00.

In December of 1990, in aid of the arrangement, the town adopted Local Law No. 9 of 1990. Section 5(A) of Local Law No. 9 provides in relevant part:

> It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pursuant to agreement with the Town of Clarkstown and recyclables, as defined in Chapter 82 of the Clarkstown Town Code, brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code.

On March 9, 1991, town police officers responded to a motor vehicle accident that had occurred on the Palisades Interstate Parkway when a tractor trailer struck the Route 59 overpass and spilled solid waste onto the parkway. *See* Dec. 11, Exs. C, D. The trailer was hauling solid waste from plaintiffs' facility to a landfill in Indiana. On March 13, 1991, the town police obtained a search warrant that directed them to search the plaintiffs' premises for books and records maintained in the business of solid waste disposal. On March 14, 1991, the town produced the property seized to a FBI agent pursuant to a grand jury subpoena signed by the U.S. Attorney for the Southern District of New York.

Then, on March 18, 1991, the town filed suit and brought an Order to Show Cause against C & A Carbone in the Supreme Court of the State of New York, Rockland County, seeking to enjoin and restrain C & A Carbone and others from "operating a transfer station and from unlawfully disposing of solid waste within the Town of Clarkstown," in violation of Local Law No. 9. On March 20, 1991, the State Court granted a temporary restraining order which provides in pertinent part that "the defendants [C & A Carbone, Inc., Recycling Products of Rockland, Inc., C & C Realty, Inc. and Angelo Carbone] be and they are hereby restrained and enjoined from operating a transfer station and from unlawfully disposing of solid waste generated within the Town of

Clarkstown, and the defendants shall immediately cease all illegal business operations at the premises known as 183 Western Highway, West Nyack, New York, pending the hearing of [the Town of Clarkstown's] motion. . . ." *See* Doc. 8, Ex. H. The town's motion for a preliminary injunction in the New York Supreme Court has been marked fully submitted, decision reserved by Justice Robert J. Stolarik.

Also pending in the New York Supreme Court, Appellate Division, Second Department, is the Town's appeal of the determination of the Hon. Alfred Weiner, Acting Supreme Court Justice, in a related Article 78 proceeding. By decision dated February 27, 1991, Justice Weiner ordered the Town Board of the Town of Clarkstown to issue plaintiffs a special permit to allow the maintenance and use of a portion of plaintiffs' site on Western Highway as a "recycling facility," as defined in Section 106.3 of the Zoning Code of the Town of Clarkstown. *See* Doc. 11, Ex. G.

The following constitutes this Court's findings and conclusions as required by Rule 65 of the Federal Rules of Civil Procedure and is the decision of this Court.

Antitrust

In the instant case, plaintiffs' first contention is that they are entitled to damages and injunctive relief under the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, and the Clayton Act, 15 U.S.C. §§ 15 *et seq.* The federal law is clear, however, that neither form of relief is available to plaintiffs based on the alleged anti-competitive effect of the Local Law.

As a preliminary matter, this Court notes that local governments are immune to damage claims under the antitrust laws. *See* Local Government Antitrust Act. 15 U.S.C. §§ 34-36. Section 35(a) provides:

> No damages, interest on damages, costs, or attorney's fees may be recovered under section 15, 15a, or 15c

of this title from any local government, or official or employee thereof acting in an official capacity.

15 U.S.C. § 35(a).

Regardless of the type of relief sought, a town is immune to claims asserted under the antitrust laws, where the State has authorized the anti-competitive actions complained of. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). It is undisputable that there are several New York statutes which authorize local control over the disposal and dumping of local garbage. *See* N.Y. Town Law, §§ 130, 198(9), 221 (McKinney 1987 & Supp. 1991); N.Y. Gen. Mun. Law § 120-w (McKinney 1986 & Supp. 1991). In addition, Environmental Conservation Law § 27-0711, N.Y. Envtl. Conserv. Law § 27-0711 (McKinney 1984 & Supp. 1991) expressly recognizes the significant role of local government in regulating solid waste management. As such, the state action exemption has been repeatedly recognized in cases dismissing antitrust claims based on local governments' actions regarding solid waste management. *See e.g., Hancock Industries v. Schaeffer*, 811 F.2d 225, 232-36 (3d Cir. 1987).

Our full understanding of this issue requires reference to the Supreme Court's recent decision in *City of Columbia, et al. v. Omni Outdoor Advertising, Inc.*, —— U.S. ——, 59 U.S.L.W. 4259 (April 1, 1991), in which the Court held the Sherman Act inapplicable to anti-competitive restraints imposed by local governments implementing state policy. The issue considered in *City of Columbia* was whether there is a "conspiracy" exception to the rule that any action that qualifies as a state action or an authorized implementation of a state policy is automatically thereby exempt from the operation of the antitrust laws.

Citing its landmark decision in *Parker v. Brown*, 317 U.S. 341 (1943) and relying on the principles of federalism and state sovereignty, a majority of the Court held that a city's restriction on billboard construction is

immune from federal antitrust liability where the municipalities' restriction is an authorized implementation of state policy. The Court rejected "any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade,'" *City of Columbia*, 59 U.S.L.W. at 4263, even if a state or its municipality acts as a conspirator with private actors in the restraint of trade.[1]

Since the anti-competitive provisions of Local Law 9 are the foreseeable result of New York State enabling law concerning solid waste collection and disposal and the Town of Clarkstown's Local Law is an implementation of authorized state policy, this Court is constrained to find that the conduct of the Town complained of is exempt under the antitrust laws. The Court further concludes that there is no genuine issue of material fact concerning either the Clayton Act or the Sherman Act claim and that defendant is entitled to a judgment on these claims as a matter of law. Accordingly, this Court denies so much of plaintiffs' motion based on these claims and grants defendant's motion for summary judgment insofar as these motions relate to the antitrust claims.

Civil Rights

In addition to those claims raised under the Sherman Act and the Clayton Act, plaintiffs also assert a claim based on a violation of their civil rights pursuant to 42 U.S.C. § 1983. In particular, plaintiffs assert that the Town's local law constitutes an unreasonable and therefore unlawful burden on interstate commerce, and deprives plaintiffs of their property without due process

---

[1] The Court noted, however, that while such action may be exempt from the operation of the antitrust laws "Congress has passed other laws aimed at combatting corruption in state and local governments." *City of Columbia*, 59 U.S.L.W. at 4263.

and denies equal protection. The Town responds that the law fulfills a legitimate state purpose by reasonable means. This presents a triable issue.

Section 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof, to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983. Thus, to establish a claim under Section 1983, plaintiffs would have to convince the trier of fact that (1) the conduct complained of was committed by persons acting under color of state law; (2) this conduct deprived plaintiffs of rights, privileges or immunities secured by the constitution or laws of the United States; and (3) that defendants' acts were the cause of injuries and/or consequent damages sustained by plaintiffs.

Most recently, in *Dennis v. Higgins*, —— U.S. ——, 59 U.S.L.W. 4117 (February 21, 1991), the Supreme Court recognized that claims based on a violation of the Commerce Clause are justiciable in this Court under 42 U.S.C. § 1983. In *Dennis*, the Court recognized that the Commerce Clause confers "rights, privileges, or immunities" upon persons within the meaning of Section 1983.

While the first element of the Section 1983 claim is met in that whatever defendant Town of Clarkstown did was action under color of state law, there is a factual dispute as to whether Local Law No. 9 deprives plaintiffs of their rights under the Commerce Clause and, if so, what damages plaintiffs sustained. Defendant's motion is denied to the extent it relates to this claim.

Seized Documents

Plaintiffs also seek to recover documents seized pursuant to the March 13, 1991 search warrant said to have been unreasonably retained in violation of the Fourth Amendment and Section 1983. Of course the town is entitled to retain the fruits of its duly authorized search but only so long as the exigencies of criminal prosecution require retention of the property as evidence. *In re Documents Seized Pursuant to Search Warrant*, 124 Misc. 2d 397, 478 N.Y.S.2d 490, 496 (1984). It is impossible, however, to resolve this issue of fact on a motion for summary judgment, so that portion of the defendant's motion is also denied.

Abstention

Alternatively, the Town requests that this Court abstain under *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) or *Younger v. Harris*, 401 U.S. 37 (1971).

As a matter of discretion this Court declines to abstain. Abstention is "the exception, not the rule," *Colorado River Water Conservation District*, 424 U.S. at 813-16, and "there is substantial authority for the proposition that abstention is not favored in [a] . . . civil rights case brought as was this one under 42 U.S.C. § 1983 and 28 U.S.C. § 1343." *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974) (footnote omitted). In finding abstention inappropriate, this Court gives considerable weight to the fact that Section 1983 provides a unique federal remedy based on the Constitution and was enacted to redress inadequate state law remedies. *See Mitchum v. Foster*, 407 U.S. 225, 238-242 (1972).

This Court also concludes that abstention would not be justified under the doctrine of *Younger v. Harris, supra.* Contrary to defendants suggestion, "*Younger* abstention is [not] always appropriate whenever a civil proceeding is

pending in a state court." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 n.12 (1987). *Younger* abstention is appropriate only if (1) there are pending state judicial proceedings, (2) the state proceedings implicate important state interests, and (3) the state proceedings provide an adequate opportunity to raise federal questions. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982).

Arguably, the first and third requirement are satisfied in this case. The second is not, however, because this case does not implicate the kind of state interests that commands *Younger* abstention. Although the New York State Supreme Court necessarily has some interest in this proceeding, this Court is not convinced that an interest that is vital to the operation of state government is involved. As the Supreme Court cautioned in *Pennzoil*, *supra*, abstention under *Younger* is appropriate only "if the State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government." *Pennzoil*, 481 U.S. at 11.

Preliminary Injunctive Relief

To obtain a preliminary injunction, the movant must demonstrate: "(a) irreparable harm [if the preliminary injunction does not issue] and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." *Jackson Dairy Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979). *See Stormy Clime Ltd. v. Progroup, Inc.*, 809 F.2d 971, 973 (2d Cir. 1987). Therefore, to prevail on this motion, plaintiffs must show both that irreparable harm to it will result if enforcement of the Town's ordinance is not enjoined and that they are likely to prevail on the merits of the claims asserted.

Insofar as Local Law No. 9 limits or otherwise prohibits the disposal without the Town of *solid waste generated without the Town*,[2] but processed at plaintiff's facility in Clarkstown, the Court finds that plaintiffs have demonstrated a likelihood of success on the merits of their claim. Although ostensibly Local Law No. 9 was promulgated to protect the health and environment of the residents of Clarkstown from the hazards associated with dumping solid wastes in landfills, the Town cannot legislatively slow down or prohibit the flow of commerce, in this case, interstate solid waste products, by artificially inflating the price of processing solid waste generated without the Town from $70/ton to $81/ton and thereby augment the economic security of the Town.

It does not seem likely that the Town's interest in meeting its tonnage requirements to defendant Clarkstown Recycling Center, Inc., and in so doing avoid a penalty for each ton under the requisite annual minimum of 120,000 tons (*see*, Doc. No. 11, Ex. E, ¶ 4), can constitutionally justify the requirement that solid waste processors and carters expend the sum of $81/ton, rather than the $70/ton they paid prior to the enactment of Local Law No. 9, to process and cart the same without of Town solid waste to the same without of Town facilities. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (a state's interest in enhancing the reputation of local products did not justify the requirement that a company build a packing plant in that state). Nor can the Town shift or defray the cost of disposing of local solid waste for the benefit of local residents to out-of-state persons or interests by improperly restricting competition and overtly blocking the interstate transportation of solid waste generated out of Town.

---

[2] This Court assumes, without deciding the issue, that the Town can regulate the disposal of garbage generated *within* the Town's territorial limits. In fact, plaintiffs do not dispute that Clarkstown may regulate solid waste generated within its borders or that which the Town contracts to dispose of for other municipalities. *See* Doc. 20, at 2.

Thus, this Court concludes that it is likely that plaintiffs can demonstrate that the Local Law constitutes an unreasonable, discriminatory and impermissible burden on interstate commerce in violation of the United States Constitution.

Since plaintiffs have established the requisite likelihood of success on the merits of the commerce clause claim, the Court turns its attention to the issue of irreparable injury. The essential element of irreparable harm has been defined to mean injury for which monetary award cannot be adequate compensation. Therefore, "it has always been true . . . that where money damages is adequate compensation a preliminary injunction will not issue." *Jackson Dairy Inc.*, 596 F.2d at 72. The importance to the movant of demonstrating clearly and convincingly exactly why money damages are inadequate cannot be overstated. *See, e.g., Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 57-65 (1975).

Inasmuch as plaintiffs have demonstrated that Local Law No. 9 threatens to or actually deprives plaintiffs of their constitutional rights, privileges or immunities under the Commerce Clause, this deprivation unquestionably constitutes irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976) (deprivation of constitutional right held to constitute irreparable injury). Moreover, absent the grant of a preliminary injunction, plaintiffs will be precluded from continuing the operation of their interstate disposal of solid waste generated without the territorial limits of the Town of Clarkstown. Because realistically it would not be possible to measure plaintiffs actual loss of customers and good will that will necessarily occur, the injury to plaintiffs would likely be irreparable.

In determining whether or not to grant a preliminary injunction, this Court has also given considerable weight to the public interest in the efficient, economical and environmental safe disposal of solid wastes. While Rule

65 does not expressly mention the public interest, our Court of Appeals has recognized that a district court "may go much further both to give or to withhold [injunctive] relief in furtherance of the public interest than where only private interests are involved." *Standard & Poor's Corporation, Inc. v. Commodity Exchange, Inc.*, 683 F.2d 704, 711 (2d Cir. 1982) (citations omitted).

Thus, in deciding to grant a preliminary injunction in the instant case, this Court recognizes, as did Chief Justice Rehnquist, in his dissenting opinion in *Philadelphia v. New Jersey*, 437 U.S. 617, 629-630 (1978), the national importance of the sanitary treatment and disposal of solid waste. If Local Law No. 9, in effect, increases the cost of shipping solid wastes through the Town of Clarkstown, and thereby limits the flow of interstate commerce, Clarkstown's health and environmental concerns may be served but the interest of the public will be compromised. Thus, this Court concludes that the need to protect the public from the extremely serious health and safety problems associated with solid waste disposal and the attendant costs of doing so provides a strong ground for the maintenance of a preliminary injunction.

A preliminary injunction is granted prohibiting the enforcement of Section 5(a) of Local Law No. 9 against plaintiffs except insofar as it concerns locally generated solid waste originating within the boundaries of the Town of Clarkstown.

Summary

The Court grants defendant's motion for summary judgment but only insofar as it relates to plaintiffs' antitrust claims. The motion is denied in all other respects. The Court at present declines to make the finding contemplated by Rule 54(b) of the Federal Rules of Civil Procedure.

Nothing in this opinion shall be construed to relate to the issue presently pending before the Appellate Division of the Supreme Court, on appeal from the Hon. Alfred Weiner, Acting Supreme Court Justice.

All counsel appearing in this action are directed to appear at Courtroom 31, United States Courthouse, 101 East Post Road, White Plains, New York on September 16, 1991 at 9:00 AM, for the purpose of a status report conference and to set a trial date.

Settle judgment, providing specific direction as to the bond posted pursuant to Rule 65(c), on waiver of notice of settlement or five (5) days notice of settlement.

SO ORDERED:

Dated: White Plains, New York
July 11, 1991

/s/ Charles L. Brieant
CHARLES L. BRIEANT
Chief Judge

APPENDIX E

[October 27, 1992]

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of October A.D. 1992.

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

2-10 Mo. No. 1047

THE TOWN OF CLARKSTOWN,
Respondent,

v.

C & A CARBONE, INC., *et al.*,
Appellants.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

APPENDIX F

TOWN OF CLARKSTOWN

Local Law No. 9 of the year 1990

A local law entitled, "SOLID WASTE TRANSPORTATION AND DISPOSAL."

Be it enacted by the TOWN BOARD of the Town of CLARKSTOWN as follows:

Section 1. Definitions

Unless otherwise stated expressly, the following words and expressions, where used in this chapter, shall have the meanings ascribed to them by this section:

ACCEPTABLE WASTE—All residential, commercial and industrial solid waste as defined in New York State Law, and Regulations, including Construction and Demolition Debris. Acceptable Waste shall not include Hazardous Waste, Pathological Waste or sludge.

CONSTRUCTION AND DEMOLITION DEBRIS—Uncontaminated solid waste resulting from the construction, remodeling, repair and demolition of structures and roads; and uncontaminated solid waste consisting of vegetation resulting from land clearing and grubbing, utility line maintenance and seasonal and storm related cleanup. Such waste includes, but is not limited to, bricks, concrete and other masonry materials, soil, rock, wood, wall coverings, plaster, drywall, plumbing fixtures, non-asbestos insulation, roofing shingles, asphaltic pavement, electrical wiring and components containing no hazardous liquids, metals, brush grass clippings and leaves that are incidental to any of the above.

HAZARDOUS WASTE—All solid waste designated as such under the Environmental Conservation Law, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Resource Conservation and Recovery Act of 1976 or any other applicable law.

PATHOLOGICAL WASTE—Waste material which may be considered infectious or biohazardous, originating from hospitals, public or private medical clinics, departments or research laboratories, pharmaceutical industries, blood banks, forensic medical departments, mortuaries, veterinary facilities and other similar facilities and includes equipment, instruments, utensils, fomites, laboratory waste (including pathological specimens and fomites attendant thereto), surgical facilities, equipment, bedding and utensils (including pathological specimens and disposal fomites attendant thereto), sharps (hypodermic needles, syringes, etc.), dialysis unit waste, animal carcasses, offal and body parts, biological materials, (vaccines, medicines, etc.) and other similar materials, but does not include any such waste material which is determined by evidence satisfactory to the Town to have been rendered non-infectious and non-biohazardous.

PERSONS—Any individual, partnership, corporation, association, trust, business trust, joint venturer, governmental body or other entity, howsoever constituted.

UNACCEPTABLE WASTE—Hazardous Waste, Pathological Waste and sludge.

SLUDGE—Solid, semi-solid or liquid waste generated from a sewage treatment plant, wastewater treatment plant, water supply treatment plant, or air pollution control facility.

TOWN—When used herein, refers to the Town of Clarkstown.

Section 2. General Provisions

A. Intent; Purpose.

I. The intent and purpose of this chapter is to provide for the transportation and disposition of all solid waste within or generated within the Town of Clarkstown so that all acceptable solid waste generated within the Town is delivered to the Town of Clarkstown solid waste facility situate at Route 303, West Nyack, New York and such other sites, situate in the Town, as may be approved by the Town for recycling, processing or for other disposition or handling of acceptable solid waste.

II. The powers and duties enumerated in this law constitute proper town purposes intended to benefit the health, welfare and safety of Town residents. Additionally, it is hereby found that, in the exercise of control over the collection, transportation and disposal of solid waste, the Town is exercising essential and proper governmental functions.

B. Supervision and Regulation.

The Town Board hereby designates the Director of the Department of Environmental Control to be responsible for the supervision and regulation of the transportation and disposition of all acceptable waste generated within the Town of Clarkstown. The Director of the Department of Environmental Control shall be responsible for and shall supervise the Town's activities in connection with any waste collection and disposal agreements entered into between the Town

and third parties and shall report to the Town Board with respect thereto.

C. Power to Adopt Rules and Regulations.

The Town Board may, after a public hearing, adopt such rules and regulations as may be necessary to effectuate the purposes of this chapter. At least seven (7) business days' prior notice of such public hearing shall be published in the official newspaper of the Town. A copy of all rules and regulations promulgated hereunder and any amendments thereto shall be filed in the office of the Town Clerk upon adoption and shall be effective as provided therein.

Section 3. Collection and Disposal of Acceptable Waste.

A. The removal, transportation and/or disposal of acceptable waste within or generated within the Town of Clarkstown shall be exclusively disposed of, controlled and regulated by the Town under this chapter and Chapter 50 and Chapter 82 of the Clarkstown Town Code, together with such rules and regulations as the Town has or may from time to time adopt.

B. All acceptable waste, as defined herein, except for construction and demolition debris, shall be removed, transported and/or disposed of only by carters licensed pursuant to the requirements of Chapter 50 of the Clarkstown Town Code and any amendments thereto. All other persons are hereby prohibited from removing, transporting or disposing of aceptable waste, except for construction and demolition debris generated within the Town of Clarkstown, and except as may be provided for herein or in the rules and regulations adopted pursuant to this chapter and/or Chapter 50 of the Clarkstown Town Code.

C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility located at Route 303, West Nyack, New York or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code, except for recyclable materials which are separated from solid waste at the point of origin or generation of such solid waste, which separated recyclable materials may be transported and delivered to facilities within the Town as aforesaid, or to sites outside the town. As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown.

D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than the facilities or sites set forth in Paragraph "C" above.

Section 4. Disposal of Unacceptable Waste.

A. No unacceptable waste shall be delivered to the Town of Clarkstown solid waste facility situate at Route 303, West Nyack, New York or other solid waste facility operated by the Town of Clarkstown or recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code by any person, including, without limitation, any licensed carter or any municipality. Failure to comply with the provisions of this section shall be subject to the provisions with respect to such penalties and enforcement, including the suspension or revocation of licenses and the imposition of fines, in accordance with the provisions of this chapter and/or Chapter 50 of the Clarkstown Town Code and any

amendments thereto. The Town Board of Clarkstown may, by resolution, provide for the disposal of sewer sludge, generated by a municipal sewer system or the Rockland County sewer district, at a disposal facility situate within the Town of Clarkstown.

B. It shall be unlawful, within the Town, to dispose of or attempt to dispose of unacceptable waste of any kind generated within the territorial limits of the Town of Clarkstown, except for sewer sludge as provided for in Section "A" above.

Section 5. Aceptable and Unacceptable Waste Generated Outside the Town of Clarkstown.

A. It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pursuant to agreement with the Town of Clarkstown and recyclables, as defined in Chapter 82 of the Clarkstown Town Code, brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code.

B. It shall be unlawful for any person to import acceptable waste or unacceptable waste from outside the Town of Clarkstown and dump same on any property located within the Town of Clarkstown and to proceed to sift, sort, mulch or otherwise mix the said material with dirt, water, garbage, rubbish or other substance, having the effect of concealing the contents or origin of said mixture. This provision shall not apply to composting of acceptable waste carried out by the Town of Clarkstown.

Section 6. Fees for Disposal of Acceptable Waste at Town Operated Facilities.

There shall be separate fees established for disposal of acceptable waste at Town operated disposal facilities. The Town Board, by resolution adopted from time to time, shall fix the various fees to be collected at said facilities. The initial fees to be collected are those adopted by the Town Board on December 11, 1990 by Resolution Number 1097.

Section 7. Penalties for Offenses.

Notwithstanding any other provision of this chapter, the violation of any provision of this chapter shall be punishable by a fine of not more than one thousand dollars ($1,000.00) or by imprisonment for a period not exceeding fifteen (15) days for each offense, or by both fine and imprisonment, and each day that such violation shall be permitted to continue shall constitute a separate offense hereunder.

Section 8. Repealer; Severability.

Ordinances and local laws or parts of ordinances or local laws heretofore enacted and inconsistent with any of the terms or provisions of this chapter are hereby repealed. In the event that any portion of this chapter shall be declared invalid by a court of competent jurisdiction, such invalidity shall not be deemed to affect the remaining portions hereof.

Section 9. When Effective.

This chapter shall take effect immediately upon filing in the office of the Secretary of State.

APPENDIX G

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

THE TOWN OF CLARKSTOWN,
Plaintiff,

-against-

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC.,
ANGELO CARBONE and "JOHN DOE 1-6",
Defendants.

FIRST AMENDED ANSWER TO
FIRST AMENDED COMPLAINT

[April 24, 1991]

Defendants, C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC., ANGELO CARBONE and "JOHN DOE 1-6", by their attorneys, GRANIK SILVERMAN SANDBERG CAMPBELL NOWICKI RESNIK, amending the Verified Answer to the First Amended Complaint, respectfully alleges:

• • • •

6. Local Law No. 9, in its effect and import, violates Article I, Section 8, Clause 3 of the Constitution of the United States, and, as such, Local Law No. 9 is illegal and invalid.

• • • •

No. 92-1402

Supreme Court, U.S.
FILED
APR 30 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC. and ANGELO CARBONE,

Petitioners,

vs.

TOWN OF CLARKSTOWN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD A. GLICKEL
Counsel of Record
Two Crosfield Avenue, Suite 108
West Nyack, New York 10994
(914) 353-4300

MURRAY N. JACOBSON
Clarkstown Town Attorney
10 Maple Avenue
New City, New York 10956

Attorneys for Respondent

3609
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTIONS PRESENTED

1. Does this case warrant further judicial review?

2. May petitioners invoke the dormant Commerce Clause to avoid local regulation of their decidely local enterprises?

LIST OF ALL PARTIES

In addition to those parties whose names appear in the caption of the case, defendants below identified as "John Doe 1 through 6" were believed to be certain individuals and entities including Carmine and Salvatore Franco, James Ribudo, Northeastern Recycling Co., Anchor Carting Co. and Sal-Car Transfer Systems, Inc. R. 117-119.[1]

1. Because respondent obtained judgment *sans* discovery in the underlying lawsuit, the correct identity of the "John Doe" defendants remains unresolved.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of All Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Statement of Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Denying the Writ	9
I. The Supreme Court has no jurisdiction to hear this case.	10
II. Petitioners failed to present facts below in support of their challenge to respondent's local law.	11
III. This case is not sufficiently important to warrant further review.	14
IV. The decisions below are not in conflict with other authority.	15
Conclusion	18

Page

TABLE OF AUTHORITIES

Cases Cited:

Brimmer v. Rebman, 138 U.S. 78 17

Chemical Waste Management v. Hunt, __ U.S. __, 112 S. Ct. 2009, 119 L. Ed. 2d 121 ..... 16, 17

City of Columbia, et al. v. Omni Outdoor Advertising, Inc., 499 U.S. __, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991) . 5

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, __ U.S. __, 112 S. Ct. 2019, 119 L. Ed. 2d 139 ..... 16, 17

Government Suppliers Consolidating Serv. v. Bayh, 753 F. Supp. 739 (S.D. Ind. 1990), *aff'd*, 975 F.2d 1267 (7th Cir. 1992) 3, 7, 15, 16, 17

Hancock Industries v. Schaeffer, 811 F.2d 225 (3d Cir. 1987) 5

Harvey & Harvey v. Delaware Solid Waste Authority, 600 F. Supp. 1369 (D. Del. 1985) 3

J. Filiberto Sanitation v. Dept. of Envir. Prot., 857 F.2d 913 (3rd Cir. 1988) 3, 7, 12, 16

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 393 (1923) 14

Page

Philadelphia v. New Jersey, 437 U.S. 617 ..... 16, 17

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 8

Rice v. Sioux City Cemetery, 349 U.S. 79 (1955) 14

Steven D. DeVito, Jr. Trucking v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I. 1991), *aff'd*, 947 F.2d 1004 (1st Cir. 1991) 16

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) .. 5

Waste Systems Corp. v. County of Martin, No. 92-1642 (8th Cir. Feb. 18, 1993), aff'g, 784 F. Supp. 641 (D. Minn. 1992) 16

Statutes Cited:

28 U.S.C. § 1257(a) 2

28 U.S.C. § 2403(b) 3

N.J. Stat. 13-1E-1 6

N.J. Stat. 40:14B-1, *et seq.* 6

6 N.Y.C.R.R. § 360-1.2(a)(45) 4

6 N.Y.C.R.R. § 360-1.2(a)(157) 4

22 N.Y.C.R.R. § 500.11 15

Contents

Page

N. Y. Laws 1991, c. 569 ("Holland-Gromack") 3, 8, 10

Town of Clarkstown Code, Local Laws 1990, No. 9 .....*passim*

United States Constitution Cited:

U.S. Const., art. I, § 8, cl. 3 2

Rules Cited:

Supreme Court Rule 30.4 2

Supreme Court Rule 10 15

Supreme Court Rule 14.1(d) 2

Supreme Court Rule 15(1) 11

Other Authorities Cited:

Cardozo, *The Nature of the Judicial Process*, Lecture II, "The Methods of History, Tradition and Sociology," pp. 80-81, Yale University Press 11

Stern, Gressman and Shapiro, *Supreme Court Practice, 6th Ed.*, ¶ 4.11, pp. 212-13 14

Wall Street Journal, December 3, 1991, at 1 17

No. 92-1402

In The

Supreme Court of the United States

October Term, 1992

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC. and ANGELO CARBONE,

Petitioners,

vs.

TOWN OF CLARKSTOWN,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The unanimous decision of the Supreme Court of the State of New York, Appellate Division, Second Department (Harwood, J.) dated August 31, 1992 is reported at 182 A.D. 2d 213 and 587 N.Y.S. 2d 681. Pet. App. 1a-15a. The decision of New York's Court of Appeals denying petitioners' motion for leave to appeal dated

October 27, 1992 is reported at 80 N.Y. 2d 760, 605 N.E. 2d 874 and 591 N.Y.S. 2d 138. Pet. App. at 47a. The unreported decisions and order of the Supreme Court of the State of New York for the County of Rockland, wherein respondent's action originated, dated July 15, 1991 and September 16, 1991 are reproduced at Pet. App. 22a-33a and 16a-21a, respectively and that court's judgment as entered on July 31, 1991 is set forth in the record at R. 22-24.

The memorandum and order of the United States District Court (S.D.N.Y.), while included in the record as one of petitioners' exhibits upon their motion for rehearing and/or reargument, (R. 313-330, Pet. App. 34a-46a), was not subject to the Appellate Division's review nor was it delivered in the case which this Court is being asked to review.[2]

STATEMENT OF JURISDICTION

Petitioners seek to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). New York State's highest court declined to hear their appeal on October 27, 1992. Pet. App. 47a. Respondent questions the Supreme Court's jurisdiction at I, *infra.* Respondent's time to file its brief in opposition to the petition was extended to and including April 30, 1993 by the Clerk of the Court in accordance with Rule 30.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The case involves the Commerce Clause of the United States Constitution (U.S. Const., art. I, § 8, cl. 3) and §§ 248-3 & 5 of the Clarkstown Code (Local Laws, 1990, No. 9 of the Town of Clarkstown). Pet. App. at 48a-54a.

---

2. The District Court's opinion was not delivered in *this* case [Rule 14.1(d)] and petitioners' parallel action was dismissed on August 6, 1991, R. 372; Petition for Certiorari (hereinafter, Petition) at p. 7.

This case does *not* draw into question the constitutionality of New York's Holland-Gromack law, the after-enacted enabling legislation, which became effective July 23, 1991 (*see* L. 1991, c. 569). Petitioners not only failed to challenge the validity of the confirmatory statute upon their state court appeal, but they had earlier misconstrued the enactment by asserting what they perceived as its preemptive effect upon respondent's local law in reargument. Pet. App. 14a and 17a; R. 373-379.[3]

STATEMENT OF THE CASE

The facts are essentially as found below. Pet. App. 1a-7a; 22a-31a. Respondent obtained a permanent injunction against petitioners' continued violation of its zoning ordinance and local law requiring that all acceptable solid waste originating or brought within Clarkstown be delivered to respondent's transfer station for shipment to out-of-state disposal facilities. Pet. App. 7a, 30a, 32a, 43a; R. 22-24, 82, 94, 99, 101.[4]

Faced with the state-ordered closure of its sanitary landfill,

---

3. Nor was the statute questioned within petitioners' short-lived federal action. It is submitted that petitioners' reference to 28 U.S.C. § 2403(b) is misplaced (*see* Petition, fn. 1 at p. 2).

4. A transfer station is simply a facility used for consolidating waste collected from various sources for transport to disposal sites (*see Harvey & Harvey v. Delaware Solid Waste Authority*, 600 F. Supp. 1369, 1371 (D. Del. 1985); those disposal sites in most instances are landfills [*see Government Suppliers Consolidating Serv. v. Bayh*, 753 F. Supp. 739 (S.D. Ind. 1990)]; one of the principal functions of the transfer station is the compacting of trash to allow its efficient long-distance transport to landfills, waste-to-energy plants and other final disposal facilities, in performing this function the transfer stations is not in competition with out-of-state final disposal facilities (*i.e.*, landfills, etc.), but, rather, *is their customer* [*see J. Filiberto Sanitation v. Dept. of Envir. Prot.*, 857 F.2d 913, 921 (3rd Cir. 1988)].

respondent received bids for the construction and operation of a municipal solid waste transfer station located at the landfill site to accommodate the daily flow of refuse generated by the Town's residents and the residents of neighboring Orangetown, New York, intended ultimately to form a part of a comprehensive county solid waste management plan. R. 169-173, 240-241. In contemplation of the new facility, the Town's zoning ordinance (Clarkstown Code, chapter 106) was amended in 1989 to exclude therefrom "transfer stations" as a permitted use anywhere within the Town. Pet. App. 8a.

In 1987 the New York State Department of Environmental Conservation ("DEC") issued permit number 4429 to C & A Carbone, Inc., authorizing the operation of a solid waste transfer station at petitioners' premises in West Nyack, New York. R. 160-162; Pet. App. 13a.[5] While they have variously referred to themselves as "recyclers" only[6] (Pet. App. 7a; R. 81-82),

---

5. New York's regulations define "*Transfer Station*," as a solid waste management facility, other than a recyclables handling and recovery facility exclusively handling non-putrescible recyclables, that can have a combination of structures, machinery, or devices, where solid waste is taken from collection vehicles and placed in other transportation units for movement to another solid waste management facility. [6 New York Code Rules and Regulations ("NYCRR") § 360-1.2 (a)(157)].

A "*Disposal Facility*", on the other hand, is defined as a solid waste management facility, or part of one, at which solid waste is intentionally placed into or on any land or water, and at which solid waste will remain after closure [6 N.Y.C.R.R.§ 360-1.2 (a)(45)].

6. Petitioners have, for some time, eschewed reference to the term that properly described their operation, *i.e.*, "*transfer station*" (*see however*, R. 160) and represented to respondent's town board that they did not wish to be a transfer station, that same was no longer permitted by respondent's zoning ordinance and

(Cont'd)

petitioners also assert that they are respondent's sole competitor within the Town and the target of respondent's anti-competitive program (Pet. App. 14a, 37a-39a; R. 94, 97, 101, 103, 121, 332, 334); a position which was summarily rejected by the district court (S.D.N.Y., Brieant, C.J.) wherein petitioners unsuccessfully advanced their claims under the Sherman Antitrust and Clayton Acts. Pet. App. 39a; R. 320.

After correctly disposing of their antitrust claims (Pet. App. 37a-39a),[7] the district court proceeded to grant petitioners' application for preliminary relief, notwithstanding that the matter was at the time *sub judice* in the state court, while conceding respondent's continued regulation of "the disposal of garbage generated *within* the Town's territorial limits". Pet. App. 43a.[8]

(Cont'd)

that "*they were not in the business of bringing household or industrial garbage to [their] site*", R. 143-144, 157-158, 305. Petitioners did not challenge respondent's zoning ordinance in the courts below nor did they claim that their transfer station constituted a legal nonconforming use. Pet. App. 8a. Contrary to their assertion here (*see* Petition, fn.3, at p. 5), petitioners' facility has never been an "authorized" recycling center. Their DEC transfer station permit is expired (Pet. App. 13a) and their facility was *never* considered a materials recovery facility ("MRF") by the DEC while their permit was in effect. R. 160, 163, 166. By mid-1991, Recycling Products of Rockland, Inc., was cited by the DEC for "operating a solid waste management facility without a permit" (R. 385) and assessed penalties totaling $110,000.

7. *See City of Columbia, et al. v. Omni Outdoor Advertising, Inc.*, 499 U.S. ___, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Hancock Industries v. Schaeffer*, 811 F.2d 225, 232-36 (3d Cir. 1987).

8. The federal preliminary injunction was unnecessary in any event as the parties had, early on, agreed in state court that respondent would not interfere with petitioners' extra-territorial business pending the final determination of the litigation. R. 46, 115.

Following the state court's judgment on the merits in favor of the respondent, petitioners were allowed to voluntarily withdraw from the federal court. R. 372.

Petitioners have never identified the alleged out-of-state source(s) of the waste handled at their facility, (Pet. App. 18a-19a, 26a, 31a), which would result in their naming violators of neighboring New Jersey's solid waste regulations[9] (Pet. App. 19a, 26a, 31a; R. 117-119), as well as those local carters who sought to avoid respondent's transfer station while retaining the benefit of the rate increases granted to them in recognition of the increased costs (*i.e.*, tipping fees) necessitated by the closure of the Town's sanitary landfill. Pet. App. 26a-27a; R. 49-50, 303-304. In the decisions below the lower court was constrained to mention petitioners' repeated failure to come forward and "lay bare their proof" in support of their otherwise conclusory statements concerning the nature of their alleged interstate business activities. Pet. App. 18a-19a, 26a, 31a.[10]

Petitioners have not previously intimated, as they now do, that

---

9. N.J. Stats. §§ 13-1E-1; 40:14B-1, *et seq.* Clarkstown is a municipality within the county of Rockland which borders with Bergen County, New Jersey. The Bergen transfer stations' 1991 tipping fee for municipal solid waste delivered to that facility was $125 per ton. By evading the mandatory delivery of trash to the New Jersey Authority's transfer stations, petitioners' New Jersey suppliers of solid waste would reap the higher rates paid by their customers (New Jersey residents) to have their trash rermoved while disposing of the "bootlegged" New Jersey waste at the much lower rate of an unauthorized facility. R. 117-118.

10. As mentioned above, petitioners offered no proof as to the origin of the waste handled at their facility or the ultimate destination thereof, so it should come as no surprise that there is little, if any, reference made by the courts below to their unsupported allegations. *See* Petition at p. 8.

they are "brokers" of municipal solid waste[11] (*see* petition at p. 4), which is characteristic of the amorphous traits they have exhibited throughout this litigation. Indeed petitioners have never articulated what, exactly, were those "burdens" imposed upon interstate commerce by respondent's local law. Thus, the district court could only imagine that the $11 differential between petitioners' purported tipping fee and the per ton charge at respondent's transfer station resulted in a "shifting" of the cost for local benefits upon out-of-state residents. Pet. App. 43a.

Permanently restraining their violation of Local Laws, 1990, No. 9 of the Town of Clarkstown, the lower court determined that petitioners had "failed to demonstrate" that respondent's local law had "any demonstrable effect whatsoever on the interstate flow of goods. *Exxon Corp. v. Governor of Maryland*, 437 U.S. at 126 n. 16". Pet. App. 30a. The court found no impact upon the *export* of waste noting that "Regardless of whether the waste is shipped from the Clarkstown transfer station or [petitioners'] facility, it is destined for out-of-state landfills". Pet. App. 30a. The court agreed with the Third Circuit's explanation that a "transfer station is not in competition with out-of-state landfills. . . it is their customer". Pet. App. 30a. *See J. Filiberto Sanitation v. Dept. of Envir. Prot.*, 857 F.2d 913, 919 (3rd Cir. 1988). The state court concluded that the economic injury petitioners alleged was

> . . . an injury suffered by the in-state

---

11. This new self-portrayal does not fit the petitioners at all. Seeing as *all* of the municipal solid waste delivered to respondent's transfer station is disposed of at out-of-state facilities, if petitioners were, in fact, "trash-brokers", they would be free to arrange for the export of trash from the Town's transfer station to other states by "facilitating contacts between the transfer station and independent truck drivers who haul waste". *Cf., Government Suppliers Consolidating Serv. v. Bayh*, 753 F. Supp. 739, 758 (S.D. Ind.), *aff'd*, 975 F.2d 1267, 1269 (7th Cir. 1992).

> [petitioners] not by out-of-state interests who are involved in interstate commerce.

Pet. App. 31a.

By judgment entered on July 31, 1991, petitioners were permanently enjoined "from operating their respective businesses or suffering and/or permitting such business operations at the premises owned by them, in violation of Clarkstown's Local Law No. 9 of 1990 and Chapter 106 of the Clarkstown Town Code at the premises located at 183 Western Highway, West Nyack, New York." R.23.

On reargument the lower court re-examined respondent's ordinance under the *Pike* test[12] with the same result. Pet. App. 19a-20a. In adhering to his original determination the court noted that, except for reference to the $11 per ton cost differential, petitioners had provided "very little information regarding the alleged burden . . . impose[d] on interstate commerce", and that petitioners had "*failed to demonstrate factually the extent to which their operation or the operation of out-of-state entities with whom they are doing business, are being affected by this Local Law.*" Pet. App. 19a-20a (emphasis supplied).

The Appellate Division noted that petitioners failed to challenge either, respondent's zoning ordinance (Pet. App. 8a) or the "Holland-Gromack" law, the state enabling statute which confirms respondent's local law. Pet. App. 14a; R. 374-375. In light of the expiration of their permit "to operate a transfer station", the state appellate court viewed as moot petitioners' claim that respondent's local law might have diminished or invalidated their "vested rights" thereto. Pet. App. 13a. Upon examination of their commerce clause argument, the Second Department obviously

12. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

granted petitioners the "benefit of the doubt" by assuming that even if the $11 difference had *any* effect on the interstate flow of solid waste, there existed no evidence that would suggest an impermissible burden on interstate commerce. Pet. App. 12a. In upholding the lower court's judgment the Appellate Division viewed petitioners' protest as one which was decidedly private, concluding that, in the final analysis, petitioners' challenge to respondent's local law formed a "singular complaint" that the enactment was harmful to petitioners' business. Pet. App. 14a.

On motion for leave to appeal petitioners, pointing to the defunct federal preliminary injunction,[13] claimed that the case presented questions which were "novel and of public importance" and that the Second Department's unanimous decision conflicted with an earlier Court of Appeals' decision. The Court of Appeals found no merit to petitioners' application and denied the motion. Pet. App. 47a.

Following the denial of their motion for leave to appeal to New York's Court of Appeals the present petition was filed.

REASONS FOR DENYING THE WRIT

Numerous reasons exist for this Court's denial of the requested writ including (1) that same would constitute an improper exercise of the Supreme Court's jurisdiction; (2) petitioners' failure in the record below to come forth and lay bare their proof; (3) the relative unimportance of this case from the

13. Petitioners were reminded by the Appellate Division during oral argument that the District Court's preliminary injunction was really no different in effect than the discretionary stay "pending appeal" of the lower court's judgment, which petitioners had been granted by the Appellate Division, and was no more determinative of the (commerce clause) question than the discretionary stay was conclusive on the merits of their appeal.

standpoint of the Supreme Court's discretionary review; and (4) petitioners' proffered authorities are not on point to the present case.

I.

THE SUPREME COURT HAS NO JURISDICTION TO HEAR THIS CASE.

It is well-settled that where a state court judgment rests on a state law ground, the Supreme Court has no jurisdiction to review the case. It is submitted that the decisions and judgment below rest on at least one "independent and adequate state ground", *i.e.*, the validity of respondent's zoning ordinance (Clarkstown Code, chapter 106) which excludes transfer stations (except for respondent's) as a permitted use within the Town. Petitioners failed to challenge the ordinance or to allege that their's was a pre-existing legal nonconforming use (*see* note 6, *supra*) and they are permanently enjoined by the decisions and judgment below from operating their business(es) in violation thereof. R. 23.

While respondent's Local Law No. 9 was subject to constitutional review in the state courts, respondent's zoning ordinance was not; nor was there a challenge below to the constitutionality of the state enabling statute *i.e.*, the "Holland-Gromack" law (*see* L. 1991, c. 569) which *confirms* respondent's "waste flow" legislation. Thus, no "federal question" has been framed concerning the validity of the state statute permitting respondent's local law and it is, of course, too late to do so here and the petition is, therefore, jurisdictionally defective.

II.

PETITIONERS FAILED TO PRESENT FACTS BELOW IN SUPPORT OF THEIR CHALLENGE TO RESPONDENT'S LOCAL LAW.

As Justice Cardozo long ago cautioned, "Many and insidious are the agencies by which the [Court's] opinion is poisoned at its sources. Courts have often been led into error in passing upon the validity of a statute, not from misunderstanding of the law, *but from misunderstanding of the facts*" (Cardozo, *The Nature of the Judicial Process*, Lecture II, "The Methods of History, Tradition and Sociology", pp. 80-81, Yale University Press, (emphasis supplied)[14].

The state courts noted petitioners' inability to demonstrate that respondent's regulation imposed any cognizable burden upon interstate commerce. Pet. App. 2a, 7a, 12a, 19a, 20a, 29a, 30a and 31a. Having failed heretofore to establish any factual basis for the judicial invalidation of respondents' local law, petitioners' current invention is purposely crafted to distract the reader from the inevitable realization that their application is meritless. Petitioners' suggestion (as raised by their question presented here) that respondent's local law serves to create a ban on the export of municipal solid waste without reference to the closure of the Town's landfill on December 31, 1990 (Pet. App. 3a), or that no other disposal facility (*see* fn. 5, *supra*) exists within the Town, would immediately bring to mind a suburban community awash in a sea of trash.

Located on the site of the Town's former municipal landfill is

---

14. So too is the admonition to opposing counsel contained in Rule 15(1) intended to obviate the circumstance whereby the Court is misled into granting review to inappropriate cases.

the respondent's Solid Waste Transfer Station which, by DEC definition, is the point from which all of the Town's trash is processed and shipped out-of-state to various landfills, waste-to-energy plants, salvagers, or other *final* disposal facilities in Connecticut, Massachusetts, Rhode Island, Illinois, New Jersey, West Virginia, South Carolina, Ohio, Indiana and Pennsylvania. The foregoing, of course, serves to dispel the notion that respondent's law operates as an export ban impermissibly burdening interstate commerce and establishes respondent's role as an active participant in interstate commerce. *See J. Filiberto Sanitation v. Dept. of Envir. Prot.*, 857 F.2d 913, 921 (3rd Cir. 1988) "[transfer] station is not in competition with out-of-state landfills . . . *the station is their customer*".

Petitioners remain unable to articulate how, or where, respondent's ordinance discriminates against interstate commerce. While they appear to challenge the ordinance here as to what they have termed an "export ban" upon the Town's trash, they continue to make reference to the $11 per ton tipping fee differential without so much as hinting at how that difference impacts out-of-state interests.[15] Of course, to do so now would necessitate the creation of heretofore non-existent facts. Pet. App. 18a-19a, 26a, 31a. But inasmuch as the *respondent* pays the out-of-state disposal facilities to which its solid waste is transported for that service and not vice

15. The $81 per ton "tipping fee" charged by respondent's transfer station is applied uniformly for all municipal solid waste without regard to origin or destination. In the Appellate Division petitioners argued that the $11 per ton price differential represented a "surcharge" against *their* business only. Petitioners never specifically alleged that the price difference had a possibly chilling effect upon, or otherwise served to slow, the in-flow of commerce nor that same possibly constituted a "shifting" of a local burden to out-of-state interests as the district court intimated . . . an argument which would have proven untenable given the New Jersey origin of their foreign municipal solid waste (*see* note 8, *supra*).

versa, the price differential has no effect at all upon the *export* of the Town's waste. The local law was not designed to "shelter" the respondent's transfer station "from out-of-state interests". *See* Petition at 15. Earlier, petitioners had claimed that *they* were respondent's only competitor. And, the petitioners cannot explain how the respondent's local law seeks to advance "the economic interests of the town's residents through restrictions on interstate commerce". Petition at 17. The "simple answer" to petitioners' argument remains that respondent's local law "does not discriminate against interstate commerce". Pet. App. 11a.

Coupled with petitioners' omission to identify respondent's facility as a transfer station, is the disguise of the genuine nature of their own in-town enterprise which included the receipt and transfer of municipal solid waste to and from their Clarkstown premises. Pet. App. 2a-3a. To be sure, petitioners operated a transfer station not only by statutory definition (*see* fn. 5, *supra*) and license (Pet. App. 3a, 13a; R. 160-162), but through their own artless admissions here (Petition at 4, 12, 15, 16 and 22) and below (R. 81-82, 89-91, 94, 97-98, 101-103, 310, 334, 336, and 346-347).[16]

The present application assumes the legitimacy of petitioners' enterprise, *i.e.* that they were not in violation of any state regulations or local ordinances, and ignores the petitioners' uncontroverted facilitation of the violation of New Jersey's waste flow regulations (Pet. App. 6a, 18a-19a, 26a, 31a; R. 117-119, 163, 382-385), the constitutionality of which, to date, remain unchallenged. N.J. Stats. § 13-1E-1 *et seq.* Any such assumption would be contrary to those facts found by the state courts upon the record below.

16. Petitioners' assertion (Pet. fn. 3, p. 5) that the lower courts did not consider petitioners' enterprise a transfer station is untrue (Pet. App. 8a, 13a). During oral argument of their state appeal, the Bench referred to the petitioners' business as a "transfer station".

Petitioners failed previously to come forward and lay bare their proof (Pet. App. 18a-19a, 26a, 31a), or to have, at least, presented facts in support of their "constitutional" argument, and their application must now fail for want of this most basic element.

III.

THIS CASE IS NOT SUFFICIENTLY IMPORTANT TO WARRANT FURTHER REVIEW.

Declaring this matter as one of "national importance" requiring this Court's guidance, petitioners' portrayal of respondent's local law as being illustrative of *all* currently existing flow control legislation (*see* Petition, fn. 4, p. 10) is essential to their entirely theoretical dissertation concerning the relative merits (or, more accurately, the lack thereof) of flow control.

The concept of "importance" in terms of this Court's discretionary review of a case relates to the importance of issues "to the public as distinguished from" importance to the "parties" themselves [*Layne & Bowler Corp. v. Western Well Works*, 261 U.S. at 393 (1923); *Rice v. Sioux City Cemetery*, 349 U.S. at 79 (1955)]. And the problem, though perceived as intrinsically important, must transcend "the academic or the episodic". (*Rice, supra*, 349 U.S. at 74).[17]

After carefully reviewing the record and all of the petitioners' contentions, the Appellate Division recognized that:

> In fact, what emerges from the appellants' multi-pronged challenge to Local Laws 1990, No. 9 of the Town of Clarkstown is a singular

17. Stern, Gressman and Shapiro, *Supreme Court Practice, 6th Ed.*, § 4.11, pp. 212-13.

> complaint that its enactment adversely affects competition in the solid waste industry.

(Pet. App. 13a).

The New York State Court of Appeals found no merit to petitioners' argument that their appeal presented questions that were either "novel or of public importance".[18] Similarly, a petition for a writ of certiorari to this Court will be granted only when there are special and important reasons therefor (*see* Rule 10).

Petitioners' creativity here cannot serve to transfigure a record otherwise bereft of any evidence in support of their challenge so as to elevate this case to the requisite status warranting this Court's review.

IV.

THE DECISIONS BELOW ARE NOT IN CONFLICT WITH OTHER AUTHORITY.

Petitioners claim that there exists a divergence in the "lower appellate courts" as to the commerce clause implications of restrictions on exports.[19] However, an unbiased review of the recent decisional law indicates consistent adherence to this Court's path [*see Government Suppliers Consolidating Serv. v. Bayh*, 975

18. The Rules of the New York State Court of Appeals require, in pertinent part: "500.11 Motions. (d) Permission to appeal in civil cases. The motion . . . shall contain . . . (v) A direct and concise argument showing why the questions presented merit review by this court, such as that they are novel or of public importance, or involve a conflict with prior decisions of this court, or there is conflict among the Appellate Divisions". (*See* 22 N.Y.C.R.R. § 500.11).

19. Petitioners did not advance their "export ban" argument to the courts below.

F.2d at 1277 (7th Cir. 1992), *aff'g*, 753 F. Supp. 739 (S.D. Ind.), applying *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, __ U.S. __, 112 S. Ct. 2019, 119 L. Ed. 2d 139; *Chemical Waste Management v. Hunt*, __ U.S. __, 112 S. Ct. 2009, 119 L. Ed. 2d 121 and *Philadelphia v. New Jersey*, 437 U.S. 617, in invalidating Indiana's statutory "backhaul ban"; *see also, Steven D. DeVito, Jr. Trucking v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775 (D.R.I. 1991), *aff'd*, 947 F.2d 1004 (1st Cir. 1991), granting a preliminary injunction against enforcement of a ban upon the out-of-state export of Rhode Island's solid waste by a Massachusetts hauler; *more recently, see Waste Systems Corp. v. County of Martin*, No. 92-1642 (8th Cir. Feb. 18, 1993), *aff'g*, 784 F. Supp. 641 (D. Minn. 1992), affirming the district court's permanent injunction against enforcement of a Minnesota ordinance which entirely forbid transport of waste out of counties located within Minnesota which had previously been disposed of at plaintiff's Iowa landfill].

Those recent decisions cited by the petitioners (*e.g., Waste Systems and DeVito*) which have dealt with attempted government restrictions upon the out-flow (*i.e.*, "export") of waste are *all* readily distinguishable from the present case because they each deal with the *final* disposal of waste (*i.e.*, at landfills, composting and waste-to-energy facilities) prohibiting its entry into interstate commerce. As the state courts recognized, respondent's transfer station is not a final disposal facility (*see* note 5, *supra*) and that *all* of the Town's solid waste re-enters the stream of interstate commerce following compaction and baling at the transfer station without impact upon out-of-state interests. Pet App. 30a.

Of course, the fact that respondent is not in competition with out-of-state concerns (*see J. Filiberto, supra*), in and of itself, does not guaranty the statute's validity. If respondent's local law, in some way, was discriminatory in its treatment of, effect upon, or represented a protectionist measure against out-of-state interests,

respondent would have to shoulder the task of justifying its burdensome regulations. *See Government Suppliers, supra*, 975 F.2d at 1278, *citing, Brimmer v. Rebman*, 138 U.S. 78, "as quoted by *Fort Gratiot*".

The Second Appellate Division's comments below are valid here too ". . . and the simple answer to [petitioners'] argument is that [respondent's local law] does not discriminate against interstate commerce (*citation omitted*) because, unlike the State or local legislation at issue in most of the cases on which the [petitioners] rely (*see e.g., Chemical Waste Management v. Hunt, supra; Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources, supra; Philadelphia v. New Jersey, supra; Dutchess Sanitation Serv. v. Town of Plattekill, supra*) the local law in issue here imposes no special fees, taxes prohibitions or duties on those transporting out-of-state articles of commerce. Rather, the local law applies evenhandedly to all solid waste processed within the Town, regardless of point of origin". Pet. App. 11a.

The Seventh Circuit has noted that "in these last decades of the twentieth century, environmental problems have produced heightened concerns about waste management, and garbage has become a frequent focal point of dormant commerce power jurisdiction (*Government Suppliers, supra*, 975 F.2d at 1277). Undoubtedly, garbage and problems inherent to its environmentally safe disposal will remain high on the list of priorities for local officials as we enter the next century.[20] But the present case would not, as petitioners' suggest, lend itself to the formation of a judicial definition of the parameters for municipal controls on the movement of solid waste or of regulating the nation's solid waste problems and plainly does not merit a grant of certiorari.

---

20. Wall St. J., Dec. 3, 1991, at 1.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD A. GLICKEL
Counsel of Record
2 Crosfield Avenue, Suite 108
West Nyack, New York 10994
(914) 353-4300

MURRAY N. JACOBSON
Clarkstown Town Attorney
10 Maple Avenue
New City, New York 10956

Attorneys for Respondents

Supreme Court, U.
FILED
MAY 7 199
OFFICE OF THE CLE

No. 92-1402

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., AND
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

PETTTIONERS' REPLY BRIEF

BETTY JO CHRISTIAN
Counsel of Record
PAUL J. ONDRASIK, JR.
DAVID A. PRICE
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

DAVID SILVERMAN
KENNETH RESNIK
GRANIK SILVERMAN
254 South Main Street
New York, New York 10956-0370
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	6

TABLE OF AUTHORITIES

CASES	Page
DeVito v. Rhode Island Solid Waste Management Corp., 947 F.2d 1004 (1st Cir. 1991), *aff'g* 770 F. Supp. 775 (D.R.I. 1991)	5
Hybud Equipment Corp. v. City of Akron, Ohio, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982)	4-5
J. Filiberto Sanitation, Inc. v. Department of Envir. Prot., 857 F.2d 913 (3d Cir. 1988)	4
Michigan v. Long, 463 U.S. 1032 (1983)	2
Waste Systems Corp. v. Cty. of Martin, 985 F.2d 1381 (8th Cir. 1993)	5
STATUTES	
Clarkstown Code Ch. 106	3
N.Y. Admin. Proc. Act § 401.2	3
1991 N.Y. Laws ch. 569 (Holland-Gromack Law)	2
Town of Clarkstown, N.Y., Local Laws 1990, No. 9	*passim*
ADMINISTRATIVE	
6 N.Y.C.R.R. pt. 360 (1987)	3
6 N.Y.C.R.R. pt. 360-12	3
ARTICLES	
Low-Level Radioactive Waste Disposal, Flow Control Are Shaping Up As Major Waste Disposal Industry Issues of 1993, Solid Waste Digest, Feb. 1993, at 12	5

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

No. 92-1402

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., AND
ANGELO CARBONE,
Petitioners,
v.
TOWN OF CLARKSTOWN,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

PETITIONERS' REPLY BRIEF

ARGUMENT

Petitioners showed in their petition that the validity of flow control laws, which have now been authorized in over half the states, is arising with increasing frequency in the lower courts. The issue has already been addressed by four federal courts of appeals, as well as several state appellate courts, with divergent results. Those lower courts are divided on such fundamental issues as the appropriate criteria for judging the constitutionality of restrictions on the export of waste—issues that only this Court can ultimately resolve.

The Opposition does not diminish the problem or offer any principled basis for reconciling the differing views of

the lower courts. Instead, Respondent primarily seeks to avoid these issues by mischaracterizing the decision of the court below and by raising factual issues that are wholly irrelevant to the question presented.

1. Respondent initially contends (Opp. at 10) that the Court lacks jurisdiction because the "state court judgment rests on an independent state ground." The short answer is that this doctrine applies only where the alleged state ground was in fact adopted by the court below as an adequate and independent basis for its decision. *See Michigan v. Long*, 463 U.S. 1032 (1983). Here, Respondent does not even cite to any passage in the opinion below as support for its "state ground" contention—and indeed that opinion is devoted almost entirely to federal constitutional issues.

Respondent's contention, rather, is that there were possible arguments based on state law that the court below *could* have relied upon (but did not). The existence of such arguments, however, plainly cannot deprive this Court of jurisdiction over the federal constitutional issues on which the opinion below was actually based.[1]

Moreover, the asserted state law grounds could not in any event have justified a decision upholding the validity of Local Law 9, the flow control ordinance at issue here. Respondent's position appears to be that Petitioners could not challenge Local Law 9 without also challenging the constitutionality of the Holland-Gromack Law (the state enabling statute) and a Town zoning ordinance applicable to transfer stations. But the Holland-Gromack Law was not even enacted by the state legislature until *after* this litigation was underway, and after the Town's adoption of Local Law 9—as Respondent points out. *See*

[1] Indeed, this Court has noted that it may review a state case decided on a federal ground even if it is clear that there was an available state ground for decision on which the state court could properly have relied. *Michigan v. Long*, 463 U.S. at 1038 n.4.

Opp. at 3.[2] And in any event, it was not the enabling statute that resulted in injury to Petitioners.

As to the local zoning ordinance (Clarkstown Code Ch. 106), Respondent is merely repeating an argument never adopted by the courts below, *i.e.*, that Petitioners' operations violate the ordinance. *See* Pet. at 5 n.3. The courts below made no such finding. Thus, the decision below does not rest on the zoning ordinance as an adequate and independent state ground for the decision.[3]

2. Respondents next contend that the factual record in this case is insufficient to support Petitioners' challenge to the validity of Clarkstown's flow control law. But the facts relevant to the issue before this Court are essentially undisputed, and the alleged "insufficiencies" do not relate to matters that this Court would have any occasion to address.

[2] Indeed, the state legislature's enactment of Holland-Gromack, retroactively authorizing the Town's adoption of Local Law 9, actually *eliminated* a potential state law issue—*i.e.*, whether the Town had authority under state law to adopt the ordinance at issue.

[3] Moreover, Respondent's contention that Petitioners are in violation of Clarkstown Code ch. 106 is not only irrelevant, but plainly without merit. Ch. 106 merely prohibits the operation of any "transfer station" within the Town other than the designated facility. Respondent's claim that Petitioners are in fact operating a transfer station, rather than a recycling facility, appears to be based solely on the fact that Petitioners' license was originally issued in 1987, at a time when all types of solid waste facilities, including recycling facilites, were denominated as "transfer stations" by the state licensing regulations. *See* 6 N.Y.C.R.R. pt. 360 (1987). The state subsequently adopted separate regulations for recycling facilities, *see* 6 N.Y.C.R.R. pt. 360-12, and Petitioners' application for renewal of its license was filed under the newly-adopted regulations.

Under state law, once a timely renewal application has been filed, the license remains in effect until the application has been acted upon. *See* N.Y. Admin. Proc. Act § 401.2. Thus, Respondent's reference (Opp. at 8) to the "expiration" of Petitioners' permit is not correct.

As explained in the Petition, the key issue—which has divided the lower courts—is whether a law restricting the export of trash out of a state is a protectionist restriction on commerce itself, which can be justified only if it advances legitimate local purposes that cannot be met by nondiscriminatory means, or is instead a law having only an incidental effect on interstate commerce and thus subject to a balancing test. *See* Pet. at 20-22. The facts relevant to this determination, which go simply to the provisions of the ordinance and its implementation by the town, are undisputed.[4] Indeed, there is not even a dispute as to the purpose of Local Law 9, since Respondent has never alleged a non-protectionist purpose, even in its Brief in Opposition.

Respondent's claims of "factual insufficiency" could become relevant, if at all, only *after* the appropriate criteria for the constitutional evaluation of flow control laws have been enunciated by this Court, and only if this Court were to conclude (contrary to Petitioners' contention) that such laws are subject to a balancing test. In that event, the case could of course be remanded for any further factual development that might be needed for final resolution of the case under the appropriate legal standard. And if this Court agrees with Petitioners that flow control laws are a direct restriction on interstate commerce, the facts relevant to a balancing test will be wholly irrelevant.

3. Respondent seeks to distinguish this case (and the federal appellate decisions upholding flow control laws[5])

[4] There is no dispute that Local Law 9, by its terms, prohibits the export of trash by anyone other than the designated facility, and that that facility charges $11 per ton more than Petitioners' facility for its services. Pet. App. 12a. It is also undisputed that, prior to the enactment of Local Law 9, Petitioner shipped separated trash to Ohio, Delaware, Pennsylvania, Kentucky, Indiana and Florida. Rec. 82.

[5] *J. Filiberto Sanitation, Inc. v. Dept. of Envir. Prot.*, 857 F.2d 913 (3d Cir. 1988); *Hybud Equip. Corp. v. City of Akron, Ohio*, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982).

from the contrary decisions in *DeVito v. Rhode Island Solid Waste Management Corp.*, 947 F.2d 1004 (1st Cir. 1991), *aff'g* 770 F. Supp. 775 (D.R.I. 1991), and *Waste Systems Corp. v. Cty. of Martin*, 985 F.2d 1381 (8th Cir. 1993), based on the fact that the local facilities accomplished "the *final* disposal of waste," Opp. at 16 (emphasis in original), while the waste sent to the Town's facility in this case "re-enters the stream of interstate commerce." *Id.* This factual difference is of no constitutional relevance in evaluating a ban on the export of trash, however, and offers no principled distinction between the two sets of cases.

Whether the Town's facility serves as a final resting point for trash or sends the trash along to other facilities, the Town's flow control law has the purpose and effect of protecting local interests—the Town and its designated contractor—at the expense of Petitioners' out-of-town customers. In either instance, Petitioners are required to pay an additional $11 per ton that they would not have to pay if they could export the trash to more efficient out-of-state facilities. The nature of the protectionism is the same no matter how the Town's facility disposes of the trash.

As a result of the proliferation of flow control laws, and of decisions addressing the validity of flow control laws, the lower courts need guidance on this issue. "Flow control may become one of the most significant waste management issues of the mid-1990s." *Low-Level Radioactive Waste Disposal, Flow Control Are Shaping Up As Major Waste Disposal Industry Issues of 1993*, Solid Waste Digest, Feb. 1993, at 12. Nothing in the Opposition contradicts the necessity for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

BETTY JO CHRISTIAN
Counsel of Record
PAUL J. ONDRASIK, JR.
DAVID A. PRICE
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

DAVID SILVERMAN
KENNETH RESNIK
GRANIK SILVERMAN
254 South Main Street
New York, New York 10956-0370
Counsel for Petitioners

FILED
JUL 16 1993
OFFICE OF THE CLERK

(4)

No. 92-1402

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

JOINT APPENDIX

BETTY JO CHRISTIAN
Counsel of Record
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
Counsel for Petitioners

WILLIAM C. BRASHARES
Counsel of Record
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Ave., N.W.
Washington, D.C. 20005
(202) 434-7300
Counsel for Respondent

PETITION FOR CERTIORARI FILED FEBRUARY 24, 1993
CERTIORARI GRANTED MAY 24, 1993

BEST AVAILABLE COPY

TABLE OF CONTENTS

Joint Appendix	Page
Docket entries, New York Court of Appeals	1
Docket entries, New York Supreme Court, Appellate Division	2
Docket entries, New York Supreme Court, Rockland County	3
Judgment with notice of entry (Rec. 22-24)	4
Order to show cause for preliminary and permanent injunction (Rec. 45-46)	7
Affidavit of Charles E. Holbrook (Rec. 58-61)	9
Affidavit of Angelo Carbone (Rec. 81-82)	12
Affidavit of Paul J. D'Alessandro (Rec. 113-19)	14
Affidavit of Murray N. Jacobson (Rec. 120-34)	20
Minutes of public hearing, Town of Clarkstown, Nov. 14, 1989 (Rec. 142-59)	34
Permit No. 4429 (Rec. 160-62)	69
Letter from Margaret Duke, New York State Dept. of Environmental Conservation, to Angelo Carbone, C & A Carbone, Inc., April 5, 1991 (Rec. 163-64)	73
Letter from Ajay R. Shah, New York State Dept. of Environmental Conservation, to Michael A. Cech, County of Rockland, April 2, 1991 (Rec. 165-68)	76
Environmental Assessment Form (Rec. 240-45)	81
Map, Plan and Report for the Establishment of Town Garbage and Refuse District (Rec. 249-80)	86
C & A Carbone, Inc. v. Holbrook (N.Y. Sup. Ct. Oct. 18, 1990) (Rec. 296-97)	110
C & A Carbone, Inc. v. Holbrook (N.Y. Sup. Ct. Feb. 27, 1991) (Rec. 298-99)	112
Affidavit of Angelo Carbone (Rec. 331-39)	116
Letter from Richard Gardineer, New York State Dept. of Environmental Conservation, to Angelo Carbone, C & A Carbone, Inc., June 8, 1991 (Rec. 382-83)	124

TABLE OF CONTENTS—Continued

	Page
Appendix to Petition for Certiorari	
Town of Clarkstown v. C & A Carbone, Inc. (N.Y. App. Div. Aug. 31, 1992)	1a
Town of Clarkstown v. C & A Carbone, Inc. (N.Y. Sup. Ct. Sept. 16, 1991)	16a
Town of Clarkstown v. C & A Carbone, Inc. (N.Y. Sup. Ct. July 15, 1991)	22a
C & A Carbone, Inc. v. Town of Clarkstown (S.D.N.Y. July 11, 1991)	34a
Town of Clarkstown v. C & A Carbone, Inc. (N.Y. Oct. 27, 1992)	47a
Town of Clarkstown, New York, Local Laws 1990, No. 9	48a
Town of Clarkstown v. C & A Carbone, Inc. (N.Y. Sup. Ct.) (First Amended Answer To First Amended Complaint)	55a

NEW YORK COURT OF APPEALS

DOCKET ENTRIES

9/11/92	Moving Papers requesting permission to appeal;
9/11/92	Intermediate court record and brief;
9/25/92	Papers in opposition and copy of brief;

NEW YORK SUPREME COURT
APPELLATE DIVISION

RE: Town of Clarkstown
-against-
C & A CARBONE, RECYCLING PRODUCTS of ROCKLAND, INC., C&C REALTY, INC., ANGELO CARBONE, *et al.*

Rockland County Clerk's #: 1549/91 (RJS)

DOCKET ENTRIES

Appellate Division Docket—No 91/07786	
Motion for State	08/22/91
Motion for Consolidation of Appeals	10/02/91
Filings:	
Record & Brief	10/03/91
Respondent's Brief	10/28/91
Reply Brief	11/04/91
Decision to Dismiss Appeal	08/31/92

NEW YORK SUPREME COURT
ROCKLAND COUNTY

DOCKET ENTRIES

ACTIONS

03/19/91	RJI—STOLARIK
07/15/91	EXHIBITS L-R
07/15/91	REPLY MEMORANDUM
07/15/91	ANSWER
• • •	
07/15/91	COMPLAINT
07/15/91	REPLY
• • •	
07/15/91	DECISION & ORDER—L46 P1396
07/15/91	ORDER TO SHOW CAUSE—L46 P1394
07/15/91	AFFIDAVIT
07/15/91	SUMMONS AND COMPLAINT
07/15/91	EXHIBITS A-D
07/24/91	ORDER L46 P1998
08/01/91	MISCELLANEOUS PAPERS
08/01/91	JUDGMENT—L46 P2463
08/09/91	NOTICE OF APPEAL
08/09/91	AFFIDAVIT OF SERVICE
08/09/91	NOTICE OF APPEAL
08/09/91	AFFIDAVIT OF SERVICE
09/19/91	MEMORANDUM
09/19/91	MINUTES
• • •	
09/19/91	ORDER—B47 P1834
09/24/91	NOTICE OF APPEAL

Judgment with Notice of Entry, Dated July 31, 1991 [22-24]

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

Index No.: 1549/91

THE TOWN OF CLARKSTOWN,
Plaintiff,

-against-

C&A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C&C REALTY, INC.,
ANGELO CARBONE and
"JOHN DOE 1 through 6",
Defendants.

JUDGMENT

PRESENT: Hon. Robert J. Stolarik, J.S.C.

Plaintiff having moved this Court for an order pursuant to CPLR § 6311 enjoining the defendants from (1) unlawfully disposing of solid waste in violation of Clarkstown's Local Law No. 9 of 1990; (2) operating a transfer station at 183 Western Highway, West Nyack, New York in violation of Chapter 106 of the Clarkstown Town Code; and (3) from conducting illegal business operations at defendants' premises, and the application having been fully submitted to the Hon. Robert J. Stolarik on May 16, 1991 at which time the parties stipulated that the motion be treated as one for summary judgment in accordance with CPLR 3212 and after reading and filing the order to show cause dated March 18, 1991, the supporting affidavits and annexed exhibits, plaintiff's summons and

amended verified complaint, the affirmation and supplemental affirmation in opposition of Kenneth H. Resnik, Esq. and opposing affidavits, defendants' amended answer and counterclaims, movant's supplemental affidavits and the attorney's statement of Richard A. Glickel with annexed exhibits submitted in support of plaintiff's application and the memoranda of law and reply memoranda of the respective parties, and said motion having been granted by decision and order of this Court duly made and entered on July 15, 1991 directing, *inter alia,* the submission of a judgment in favor of the plaintiff,

NOW, on motion of Richard A. Glickel, attorney for plaintiff, it is

ADJUDGED and DECREED that Clarkstown's Local Law No. 1990 is valid *and* constitutional; and it is further

ADJUDGED and DECREED that the defendants are in violation of the provisions of Clarkstown's Local Law No. 9 of 1990; and it is further

ADJUDGED and DECREED that the plaintiff is entitled to the injunctive relief sought; and it is

ORDERED and ADJUDGED that the defendants are hereby restrained and permanently enjoined from operating their respective business or suffering and/or permitting such business operations at the premises owned by them, in violation of Clarkstown's Local Law No. 9 of 1990 and the defendants are hereby directed to immediately cease all such operations in violation of Clarkstown's Local Law No. 9 of 1990 and Chapter 106 of the Clarkstown Town Code at the premises located at 183 Western Highway, West Nyack, New York, and it is further

ORDERED that all counsel shall appear at chambers on Wednesday, August 7, 1991 at 9 a.m. to attend a conference for the scheduling of disclosure in furtherance of the assessment of damages.

Dated: New City, New York
July 31, 1991

/s/ Robert J. Stolarik
HON. ROBERT J. STOLARIK
J.S.C.

To:

Richard A. Glickel
Special Counsel to
Murray N. Jacobson, Town Attorney
Attorney for Plaintiff
Two Crosfield Avenue—Suite 205
West Nyack, New York 10994

Granik Silverman, et al.
Attorneys for Defendants
254 South Main Street
P.O. Box 370
New City, New York 10956

Order to Show Cause for Preliminary and Permanent Injunction—Proposed Summons and Verified Complaint [45-47]

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

[Title Omitted in Printing]

ORDER TO SHOW CAUSE

PRESENT: HON. JOAN B. LEFKOWITZ, Justice of the Supreme Court.

Upon reading the summons and verified complaint and the affidavits of Paul J. D'Alessandro, Administrative Lieutenant, John P. Kubran, Detective Lieutenant, both of the Clarkstown Police Department, Charles E. Holbrook, Supervisor of the Town of Clarkstown, and Murray N. Jacobson, Town Attorney of the Town of Clarkstown, each sworn to on the 18th day of March, 1991, from which is appears that this action is brought for a permanant injunction restraining and enjoining the defendants from operating a transfer station ad from unlawfully disposing of acceptable waste in violation of Local Law No. 9 of 1990 and those chapters of the Town Code regulating the transportation and disposal of solid waste within the Town of Clarkstown, and the plaintiff having applied for a preliminary injunction and a temporary restraining order herein,

Let the defendants show cause before this Court at the Rockland County Courthouse, Main Street, New City, New York on the 29th day of March, 1991 at 9:30 a.m., or as soon thereafter as counsel can be heard why an

order should not be made and entered herein restraining and enjoining the defendants from operating a transfer station and from unlawfully disposing of solid waste in violation of Local Law No. 9 of 1990 and those chapters of the Town Code regulating the transportation and disposal of solid waste within the Town of Clarkstown and directing that the defendants immediately cease all illegal business operations at the premises known as 183 Western Highway, West Nyack, New York, pending the hearing and determination of plaintiff's motion and why the plaintiff should not have such other and further relief as to the Court may seem just and proper.

Sufficient reason appearing therefore, it is

ORDERED, that pending the hearing and determination of this motion, the defendants be and they are hereby restrained and enjoined from operating a transfer station and from unlawfully disposing of solid waste generated within the Town of Clarkstown, and the defendants shall immediately cease all illegal business operations at the premises known as 183 Western Highway, West Nyack, New York, pending the hearing of plaintiff's motion, and it is further

ORDERED, that service of a copy of this order and the papers upon which it is granted upon defendants, on or before the 21st day of March, 1991 be deemed good and sufficient service.

Dated: New City, New York
March 18, 1991

And it is further ordered that the phrases "and without" and "and determination" are stricken provided that defendants post a bond of $10,000 with the Commissioner of Finance of Rockland County.

/s/ Joan B. Lefkowitz
J.S.C.

March 19, 1991

Affidavit of Charles E. Holbrook, Sworn to March 18, 1991, for Plaintiff, in Support of Application [58-61]

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

[Title Omitted in Printing]

AFFIDAVIT

STATE OF NEW YORK)
ss.:
COUNTY OF ROCKLAND)

CHARLES E. HOLBROOK, being duly sworn, deposes and says:

1. That he is the duly elected Supervisor of the Town of Clarkstown and a member of the Clarkstown Town Board and he respectfully makes this affidavit in support of the present application for an order restraining and enjoining the defendants from operating a transfer station and from unlawfully disposing of solid waste in violation of Local Law No. 9 of 1990 and the Town Code of the Town of Clarkstown and directing that the defendants immediately cease all illegal business operations at 183 Western Highway, West Nyack, New York.

2. That on December 31, 1990 the Clarkstown Town Board duly passed and adopted Local Law No. 9 of 1990 entitled "Solid Waste Transportation and Disposal." A certified copy of Local Law No. 9 of 1990 is annexed to the complaint herein as exhibit "A."

3. Local Law No. 9 of 1990 was enacted by the Town Board in response to the closing of the TOWN's landfill operation at the end of 1990 and is intended to address

the transportation and disposal of solid waste generated within the TOWN through the construction and operation of a solid waste facility known as a "transfer station" through which all acceptable solid waste generated by the residents of the TOWN and collected by duly licensed private carters would be weighed, baled and loaded for transport and disposal to out-of-state landfills.

4. The contract for the construction and operation of the TOWN's transfer station was awarded pursuant to proposal and bid in early 1990 and the facility has been operational since the beginning of this year. The TOWN is obligated to deliver for transport and disposal through this facility a specified annual tonnage of acceptable solid waste generated within the Towns of Clarkstown and Orangetown [1] and will be assessed a penalty for each ton under the requisite annual minimum of 120,000 tons.

5. Local Law No. 9 of 1990 directs that *all* acceptable waste generated within the territorial limits of the TOWN is to be transported and delivered to the TOWN's transfer station at Route 303 in West Nyack or to other disposal or recycling facilities operated by the TOWN or recycling centers established by special permit. In the case of acceptable waste brought to a recycling facility the law requires that the unrecycled residue be disposed of at the TOWN's transfer station.

6. Since 1989 residents of the TOWN have been separating at the point of origin or generation recyclable materials. This program has proved to be enormously successful and the list of recyclables has been expanded to include newspapers, glass, aluminum cans, magazines and junk mail. By June of this year plastic bottles and

---

[1] Upon information and belief on Monday, March 11, 1991, the Orangetown Town Board unanimously enacted a local law similar to Clarkstown's Local Law No. 9 of 1990 requiring all carters who pick up solid waste within the Town of Orangetown is to be transported and delivered to the Clarkstown transfer station at Route 303, West Nyack, New York.

containers will be included. Thus, there remains very little recyclable material in the acceptable solid waste generated within the TOWN to be collected by the carters permitted to operated within the TOWN.

7. By unlawfully bypassing the TOWN's transfer station, the defendants are costing the TOWN and its residents thousands of dollars daily in uncollected revenues as well as increasing the likelihood of the TOWN's failure to meet is contractual obligation to the transfer station.

8. By receiving, baling, and loading for transport and disposal solid waste generated within and without the Town of Clarkstown, the defendants are operating a transfer station in violation of Local Law No. 9 of 1990 and Chapter 106 of the Clarkstown Town Code.

9. Without question the TOWN has already suffered irreparable harm in losses estimated in the hundreds of thousands of dollars. The ongoing investigation by the TOWN's law enforcement officers has established that the defendants are acting in violation of said laws and ordinances and will continue to do so unless they are immediately restrained and enjoined by order of this Court and directed to cease all illegal business operations at the premises owned and/or operated by said defendants at 183 Western Highway, West Nyack, New York.

WHEREFORE, deponent respectfully requests an order of this Court restraining and enjoining the defendants from unlawfully disposing of solid waste in violation of Local Law No. 9 of 1990 and those chapters of the Town Code regulating the transportation of solid waste within the Town of Clarkstown and directing that the defendants immediately cease all illegal business operations at 183 Western Highway, West Nyack, New York and for such other and further relief as to the Court may seem just and proper.

/s/ Charles E. Holbrook
CHARLES E. HOLBROOK

[Notary Omitted in Printing]

Affidavit of Angelo Carbone, Sworn to April 3, 1991, for Defendants, in Opposition to Application [81-82]

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

[Title Omitted in Printing]

AFFIDAVIT

1. ANGELO CARBONE, being duly sworn, deposes and says as follows:

2. I am a defendant in the above entitled action and an officer of C & A Carbone, Inc. and as such am fully familiar with the underlying facts and circumstances of the within matter. I have read plaintiff's application and supporting papers and make this affidavit in opposition to plaintiff's motion for a preliminary injunction pending a final determination of the merits of the case.

3. C & A Carbone, Inc. maintains a recycling facility located at 183 Western Highway, West Nyack, Town of Clarkstown, County of Rockland. At that site, waste is received from out of state as well as parts of New York outside the Town of Clarkstown.

4. After receipt, the waste is "shaken down" or separated, the recyclables are removed and the remaining waste left after separation is prepared for disposal.

5. Once the above process is completed, the various components are shipped by ICC licensed truckers from our site in New York to facilities in the midwest and south including landfills, resource recovery sites and other disposal facilities in Ohio, Delaware, Pennsylvania,

Kentucky, Indiana and Florida. On a weekly basis, C & A Carbone, Inc. processes and ships over one hundred fifty (150) tons of waste interstate, using ICC licensed truckers for the transport.

/s/ Angelo Carbone
ANGELO CARBONE

[Notary Omitted in Printing]

Affidavit of Paul J. D'Alessandro, Sworn to April 18, 1991, for Plaintiff, in Further Support of Application [113-119]

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

[Title Omitted in Printing]

AFFIDAVIT

STATE OF NEW YORK)
ss.:
COUNTY OF ROCKLAND)

PAUL J. D'ALESSANDRO, being duly sworn, deposes and says:

1. That he is an administrative lieutenant for the Clarkstown Police Department and he makes this affidavit in support of plaintiff's application for summary judgment herein or, alternatively for an injunction *pendente lite* and in reply to the allegations contained in the answering affidavits of the defendant Angelo Carbone and of one Gil Font.

2. There is no question but that following the motor vehicle accident of March 8, 1991, (as previously described in the affidavits of myself and Lt. John Kubran both dated March 18, 1991) wherein a tractor trailer load of garbage was torn open when it struck the Route 59 overpass to the Palisades Interstate Parkway, that a number of similar vehicles [1] were followed from the de-

[1] In all a total of eleven (11) tractor-trailer loads were diverted to the TOWN's transfer station from March 9 through March 18, 1991, where they were weighed and off-loaded. The said eleven loads represent a minuscule percentage of the total number of loads transported from the defendants' location within this time frame.

fendants' location en route to the New York State Thruway, detained and directed to the Town of Clarkstown's transfer station on Route 303 in West Nyack, New York. It was then and is now the position of the Town of Clarkstown and its law enforcement officers that the defendants are operating an illegal transfer station in violation of the Clarkstown Town Code, specifically, Chapter 106 entitled "Zoning".[2]

3. Undoubtedly, Mr. Font was advised of the TOWN's position vis-a-vis the only legally permitted transfer station within the Town of Clarkstown.

4. Deponent never suggested to Mr. Font that "Miele could help him in New Jersey" nor would deponent ever offer such advice inasmuch as solid waste transferred from the Miele facility in New Jersey must go to the Bergen County transfer station for baling and out-of-state transport.

5. Not a single driver was intimidated or otherwise threatened in any way by either, deponent or any other member of the TOWN's police department and the allegation in the Font affidavit that a driver was "frightened" into carrying a load to the State of Pennsylvania is a ridiculous lie. In fact, it was only as an attempt to help those drivers who had expressed concern over having to travel great distances only to return empty, that they were advised that they might be able to make arrangements with Clarkstown Recycling Center, Inc. for their reloading with acceptable solid waste which had lawfully been delivered to and baled at the TOWN's transfer station.

---

[2] Apparently the defendants had been operating an illegal transfer station under the guise of a so-called "recycling facility or center". However, in their complaint filed in the United States District Court on March 27, 1991, the defendants boldly assert their direct competition with the TOWN's transfer station.

6. Every vehicle that was directed to the TOWN's transfer station was released following weighing and off-loading; none were impounded nor forfeited as the instrumentalities employed in furtherance of the defendants' illegal activities. Mr. Font's statement that ". . . within the last two weeks, the Town of Clarkstown by its police department has stopped many of our trucks on the way into the Carbone facility directing them not to go onto the premises," is also untrue. Since Mr. Glickel's *in camera* agreement that, pending the further modification of the temporary restraining order or the Court's granting of the injunctive relief sought, the TOWN would not continue to divert vehicles from the defendants' premises, no vehicles have been stopped by the Clarkstown Police Department.

7. Prior to the incident of March 8, 1991 involving the spillage on the PIP, it was presumed that the defendants were operating a "recycling facility" (albeit without the requisite special permit). Only following that occurrence and our obtaining a warrant and executing a search of the defendants' premises was the extent of defendants' illegal activities revealed.[3] Angelo Carbone states in his affidavit to this Court that C&A Carbone "processes and ships" over 150 tons of waste weekly. According to the defendants' shipping logs a total of 970 tons of "municipal solid waste" was transported from the defendants' premises during the six-day period beginning February 25 through March 2, 1991! The shipping manifests identify the shippers of the municipal solid waste as "C&A Carbone" and "R.P.R." destined for out-of-state landfills.[4]

[3] Within twelve (12) hours of the search of defendants' premises, deponent received a subpoena duces tecum from the United States Attorney for the Southern District of New York directing the delivery of all of the seized documents to a special agent of the FBI for transmission to a federal grand jury.

[4] "R.P.R." presumably identifies the defendant Recycling Products of Rockland, Inc. which, to the best of your deponent's knowledge and belief, is neither a licensee nor a permittee of either the DEC or the TOWN.

8. As someone who by necessity became intimately familiar with the contents of those loads originating from defendants' premises which were diverted and eventually off-loaded at the TOWN's solid waste facility, deponent would describe said contents as "garbage," plain and simple. Deponent wouldn't know if, prior to baling and loading, defendants' garbage was sifted, shaken, or picked over for the removal of any purported recyclable; however, deponent can report to the Court that there was found within these loads tires mounted on steel rims, truck springs, unmounted tires, automobile fenders and exhaust systems, putrescible household waste including vegetable and animal matter and other foodstuffs, disposable baby diapers, bathroom tissue, surgical gloves and intravenous feeding bags.[5]

9. Defendants allege within their federal court complaint (which they have annexed to their papers in opposition to the present application as exhibit "A") that deponent and Det. Lt. Kubran "directed" the off-loading of the ill-fated trailer load of garbage onto trucks owned by the defendant(s). In reality, several individuals were already hard at work upon our arrival at the scene of this accident, frantically attempting to remove the garbage from the scene before the origin of same could be discovered by law enforcement personnel. A number of these workers identified themselves as employees of Northeastern Recycling Co. of 77 Brookside Place, Hillsdale, New Jersey. Northeastern Recycling, upon information and belief, is neither owned nor operated by the Carbones but, rather, is owned by the Franco family. In fact, Carmine Franco, one of the Northeastern partners, appeared at the PIP accident scene and identified himself to NYS Trooper Michael Utzig and an individual identifying himself as Angelo Franco was also at the scene. Members of

[5] According to the DEC's definition: "Recyclable" means solid waste that exhibits the potential to be used *repeatedly* in place of a virgin material (6 NYCRR § 360-1.2[b][120]).

the Franco family appeared at the TOWN's transfer station at Route 303 in West Nyack, New York when trucks had been diverted to that facility for weighing and offloading. Post-accident surveillance of the defendants' premises revealed the delivery of waste to that location by trucks registered to Anchor Carting Co. of Weehawken, New Jersey, another Franco entity. It is obvious to your deponent that the Francos are also involved in the illegal enterprise being conducted at defendants' premises and that they and their corporate alter-egos or partnerships are the "John Doe" defendants herein.

10. Further evidence of the involvement of the Franco family in the defendants' business was the presence of one James Ribaudo at the premises at the time that your deponent and other members of the Clarkstown Police Department executed the aforementioned warrant. Mr. Ribaudo is a long-time Franco employee and president of Sal-Car Transfer Systems, Inc. of Hillsdale, New Jersey, a transfer station owned and operated by the Francos. According to Bergen County authorities Sal-Car has admitted to violating New Jersey State Waste Flow Regulations by accepting trash that is supposed to go to the Bergen transfer station. It is estimated that Sal-Car deprives the Bergen County Authority of roughly 100,000 tons of trash annually! In July, 1986 Salvatore Franco was barred from New Jersey's garbage industry for attempting to circumvent that state's Board of Public Utilities' Regulations. In April, 1987 Carmine Franco was barred from the New Jersey garbage industry for conspiring to restrain free trade within the industry.[6] According to Salvatore Franco, neither brother is in the garbage

[6] On September 4, 1987, New Jersey's Board of Public Utilities upheld the April, 1987 Administrative Law Judge's ruling to revoke Carmine Franco's certificate of public convenience and necessity and to bar Franco from further participation in the solid waste collection and disposal industries. Franco and his company each were assesed penalties of $1.1 million as a result of their anti-competitive activities.

business, "We're in the recycling business now"? It therefore comes as no surprise that the defendants have been operating an illegal transfer station and will continue to do so until enjoined by court order.

11. The defendant Recycling Products of Rockland, Inc., is the embodiment of the Franco-Carbone alliance. In a corporte disclosure form submitted to the TOWN in furtherance of Bid No. 77-89, the ownership of that incorporation was identified as follows: "Salvatore Franco —50%; Angelo Carbone—25%; Carmine Carbone—25%." Upon information and belief, Recycling Products of Rockland, Inc., is neither a licensee nor a permittee of the New York State Department of Environmental Conservation, the TOWN or any other agency or department involving the regulation of the collection, separation, processing, packaging, sale or transport of solid waste, recyclable materials, or the residue thereof.

WHEREFORE, deponent respectfully requests an order of this Court granting summary judgment permanently enjoining and restraining the defendants from maintaining and operating an illegal transfer station in violation of the Clarkstown Town Code and Local Law No. 9 of 1990 and directing that the defendants immediately cease all illegal business operations at 183 Western Highway, West Nyack, New York or, in the alternative, granting plaintiff's application for an injunction *pendente lite*, and for such other and further relief as to the Court may seem just and proper.

/s/ Paul J. D'Alessandro
PAUL J. D'ALESSANDRO

[Notary Omitted in Printing]

[7] So reported The Hudson Dispatch on Monday, December 4, 1989, *"Trash king still rides high despite probes"*. According to Carol Ash, the regional director of the State of New York's Environment Office in New York City, "Suddenly, everyone wants to call themselves recyclers", *Mob Looks at Recycling and Sees Green*, The New York Times, Wednesday, November 28, 1990.

Affidavit of Murray N. Jacobson, Sworn to April 19, 1991, for Plaintiff, in Further Support of Application [120-134]

SUPREME COURT
OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

[Title Omitted in Printing]

AFFIDAVIT

STATE OF NEW YORK)
ss.:
COUNTY OF ROCKLAND)

MURRAY N. JACOBSON, being duly sworn, deposes and says:

1. He is the duly appointed Town Attorney for the Town of Clarkstown and he respectfully makes and submits this affidavit in support of the TOWN's application for an order granting summary judgment enjoining and restraining the defendants from their continued operation of a transfer station in violation of the Clarkstown Town Code and the local laws and ordinances of the Town of Clarkstown and in reply to defendants' opposition thereto.

2. From the outset, it must be noted that the TOWN's zoning ordinance does not permit the construction and/or maintenance of a transfer station anywhere within the TOWN. As deponent has previously stated in his affidavit of March 18, 1991, the only lawfully permitted transfer station within the Town of Clarsktown is the TOWN's facility located on Route 303 in West Nyack, New York.

3. Defendants are well aware of the foregoing and do not contest this fact. In his public comments to the

Clarkstown Town Board at a hearing on the defendant CARBONE's application for a special permit to operate a "recycling facility," Kenneth H. Resnik stated, on November 14, 1989, that his client ". . . neither intended nor wanted a transfer station and that same is not permitted under the TOWN's zoning ordinance." [1] (A copy of the minutes of the public hearing are annexed hereto and made a part hereof as exhibit "E").

4. As recently as last month the defendants continued to deny any involvement in the operation of an illegal transfer station, restating that it was their desire to operate and maintain a "recycling facility or center"; however, since the commencement of this litigation, the defendants have abandoned that masquerade and now identify themselves as interstate transporters of solid waste engaged in direct competition with the TOWN's transfer station.[2]

5. The permit issued to defendant CARBONE on or about July 17, 1987 is for the operation of a "solid waste transfer station." Two (2) weeks ago, the TOWN's

---

[1] As defined by DEC regulations, *"Transfer station* means a solid waste management facility, other than a recyclables handling and recovery facility exclusively handling non-putrescible recyclables, that can have a combination of structures, machinery, or devices, where solid waste is taken from collection vehicles and placed in other transportation units for movement to another solid waste management facility" (6 NYCRR § 360-1.2[b][157]).

As amended May 23, 1989, Chapter 106 of the Clarkstown Code defines *"Transfer Station*—An area of land upon which is located, permanently or temporarily, structures, machinery and/or other devices where any solid waste, refuse, leaves, trash, trees or soil is taken from a collection vehicle and placed either upon the land, into any other transportation unit or into any other device for future movement to another location" (Clarkstown Code § 106-3).

[2] See paragraphs "4", "12", "24", "43" and "47" as contained in the defendants' federal complaint filed in the United States District Court (SDNY) on March 27, 1991, annexed to defendants' opposing papers as exhibit "A".

supervisor was advised in writing by New York State's Department of Environmental Conservation that the DEC considers the defendant's facility ". . . to be primarily a transfer station and not a Materials Recovery Facility (MRF)." In that same correspondence, the DEC's regional engineer expressed that the defendants' tactic of describing transported, baled garbage as "recyclables" is "contrary to the Department's rules and regulations." And in a separate correspondence dated April 5, 1991 the defendants were notified by the DEC's regional permit administrator that ". . . baled garbage bound for incineration is not considered to be a recyclable material. . . ." (Copies of the permit no. 4429 and correspondence dated April 2, 1991 and April 5, 1991 are annexed hereto and made a part hereof and marked as exhibits "F," "G" and "H," respectively).

6. The defendants seek to challenge the validity of the TOWN's Local Law No. 9 of 1990, but they have failed to raise any objectiton to the TOWN's zoning ordinance. It is respectfully submitted that this Court need look no further than defendants' operation of a transfer station in violation of the TOWN's zoning ordinance in granting the requested permanent injunction (*Incorporated Vil. of Freeport v. Jefferson Indoor Marina, Inc.*, 162 AD2d 434, [2d Dept., June, 1990]). There is no question but that a local government may ban commercial solid waste transfer stations from its territorial limits (*Town of LaGrange v. Giovenetti Enterprises*, 123 AD2d 688, 507 NYS2d 54, 55; *Town of Islip v. Zalak*, [A.D. 2 Dept.], N.Y.L.J., Tuesday, 2/26/91, p. 21, 1991 WL 18606) and designate the town's transfer station as the sole facility for delivery of all solid waste (*Vinnie Montes Waste System, Inc. v. Town of Oyster Bay*, [A.T. 9th J.D.], 1991 WL 30383).

7. Given the heretofore constant posture of the defendants that they were not operating a transfer station, their general challenge to the constitutionality of the

"other chapters" of the Clarkstown Town Code cannot pertain to the TOWN's zoning ordinance (*Moran v. Village of Philmont*, 147 AD2d 230, 542 NYS2d 873) which enjoys a strong presumption of constitutionality (*see, de St. Aubin v. Flacke*, 68 NY2d 66, 76, 505 NYS2d 859, 496 NE2d 879). Nor can it be said that Chapter 106 of the Town Code represents an abuse or the improper exercise of the TOWN's police power (*Town of Islip v. Zalak, supra; Al Turi Landfill, Inc. v. Town of Goshen*, 556 F Supp 231 [1982]).

8. Should the Court feel that it is necessary to look beyond the enforcement of the TOWN's zoning ordinance and scrutinize the implementation of the TOWN's Local Law No. 9 of 1990, the defendants must again fail.

9. The defendants have alleged in their amended answer as a "third affirmative defense and first counterclaim" a lack of compliance with Article 8 of the Environmental Conservation Law (SEQRA). A review of the opposing papers including the defendants' District Court pleading establishes that the defendants are not aggrieved by the adoption of Local Law No. 9 of 1990 in a manner which would qualify them for standing to raise a SEQRA challenge. In this regard, the defendants must demonstrate that they will suffer an injury that is environmental and not solely economic in nature (*Mobil Oil v. Syracuse Indus. Dev. Agency*, 76 NY2d 428, 559 NYS2d 974; *Greenwich Comm. v. Warren*, 164 AD2d 469, [3d Dept., December 27, 1990]). The defendants have not identified any non-economic, environmental damage to their premises at 183 Western Highway, West Nyack, New York.

10. The opposition is replete with the "buzz-words" of modern environmental law and premised upon counsel's supposition that plaintiff must have missed a turn in the labyrinth of statutory and procedural requirements housed within the Environmental Conservation Law, the applicable regulations of the Department of Environ-

mental Conservation and such other sections and enacting provisions of the "Solid Waste Management Act of 1988" (L.1988, c.70; 6 NYCRR Part 360). But how can the defendants overcome[3] the properly issued permit of the DEC for the operation of a solid waste transfer station at the TOWN's former landfill site?[4]

11. The genesis of the TOWN's transfer station can be traced to the TOWN's sanitary landfill which facility was in operation on August 28, 1977,[5] the effective date of Part 360 of 6 NYCRR. Pursuant to that statute, the TOWN was required to submit an application for a permit to operate an existing solid waste management facility within six (6) months of the effective date of Part 360. Such application was submitted and re-submitted and ultimately denied, which resulted in the entry of an "Order on Consent" dated May 16, 1980. That order permitted the operation of the TOWN's sanitary landfill through March 1, 1983 and imposed various conditions upon the use of the facility.[6]

---

[3] Presuming that the defendants are possessed of the requisite standing to mount a SEQRA challenge in the first instance.

[4] DEC permit no. 3-3920-166/1-0 issued 12/31/90 makes the following reference to SEQRA: *"STATE ENVIRONMENTAL QUALITY REVIEW ACT* under the State Environmental Quality Review Act (SEQRA), the project associated with this Permit is classified as an unlisted action with the Town Board, Town of Clarkstown designated as the lead agency. It has been determined that the project will not have a significant effect on the environment" (a copy of the permit under the Environmental Conservation Law is annexed hereto and marked exhibit "I").

[5] The landfill started as the town "dump" at or near the same location in approximately 1950.

[6] One such condition required the TOWN to inform the DEC by October 1, 1980, whether the TOWN would participate in the "county-wide solid waste disposal system" (hereinafter known as the "Regional Plan"), outlined in the Rockland County Solid Waste Study. To date, Rockland County has yet to implement a "regional plan".

12. The Clarkstown Sanitary Landfill continued to operate through 1983 and thereafter a "Modified Order on Consent" was entered on August 6, 1984, under which the sanitary landfill remained open. A "Final Order on Consent" providing for the closure and remediation of the sanitary landfill site was entered on August 7, 1989. The stated goal of that order was "the development and implementation of a remedial program for the site, which program shall include a remedial investigation/feasibility study and the design and implementation of the selected remedial alternative." (Copies of the orders are annexed hereto as exhibit "J," "K" and "L," respectively).

13. Thus confronted with the closure of its sanitary landfill, the TOWN was required to construct and operate a solid waste transfer station,[7] ideally to be located at the landfill site. A full Environmental Assessment Form (EAF) was prepared on behalf of the TOWN by its consultants Velzy Associates and, following public hearing the Town Board adopted the resolutions declaring a negative declaration with respect to the proposed construction and operation of a solid waste transfer station at the existing Clarkstown sanitary landfill site and adopting the TOWN's Local Law No. 9 of 1990 entitled "Solid Waste Transportation and Disposal." (Copies of the EAF and "declaration of no impact" are annexed hereto and made a part hereof and marked exhibits "M" and "N," respectively).

14. The sanitary landfill remained open through December 31, 1990 and the TOWN's transfer station became operational on January 2, 1991. The following is a brief chronology of the various steps leading to the construction and implementation of the TOWN's facility:

a. The Consent Order was signed by the TOWN on June 30, 1989 and by the DEC on August 7, 1989;

---

[7] The DEC's order dated August 7, 1989 specifically anticipated the "completion of the proposed transfer station" (¶ XX, 2).

b. The TOWN had completed SEQRA proceedings concerning the transfer station site on June 19, 1989;

c. On June 29, 1989, a letter was received from the DEC, Region 3 requesting certain information on the siting of the station;

d. On August 8, 1989, the Town Board commenced the request for proposals procedure, pursuant to General Municipal Law (GML) § 120-w for the design, construction, operation and maintenance of a solid waste transfer station to be located on Route 303, West Nyack, New York, together with transportation of the solid waste delivered to the transfer station to an approved landfill for final disposal;

e. Notices concerning the Request for Proposals were published commencing August 11, 1989;

f. The 60-day public comment period on the Request for Proposals ended October 10, 1989, and the subsequent ten-day period ended October 20, 1989, all as required by GML § 120-w;

g. The request for proposals was published commencing October 25, 1989, to be returnable November 24, 1989;

h. The transfer station site study prepared by Velzy-Weston was completed November 10, 1989 and forwarded to DEC for comments. This study contained tests, borings, etc., done on the site since June 29, 1989 as requested by the DEC;

i. Pre-proposal conferences were held with interested parties on Novembzer 2, 1989 and November 13, 1989;

j. On November 24, 1989, eleven (11) proposals for the transfer station were received by the TOWN;

k. Interviews were held with ten (10) of the proposers during subsequent weeks;

l. On December 29, 1989, the Town Board selected Clarkstown Recycling Center, Inc., as the proposer to whom the project would be awarded;

m. Inasmuch as Clarkstown Recycling Center, Inc. was not the lowest proposer, a public hearing was held on January 16, 1990 as required by GML § 120-w;

n. On January 2, 1990, the contract was awarded to Clarkstown Recycling Center, Inc. and findings were made by the Town Board as required by statute;

o. Meetings were held with the DEC on January 17, 1990 and January 25, 1990, at which time the site study of Velzy-Weston was orally approved;

p. Final plans for station site were prepared and submitted with formal applications on March 2, 1990 seeking a permit from the DEC;

q. The DEC issued a permit to Clarkstown Recycling Center, Inc., on May 1, 1990, which authorized Clarkstown Recycling Center, Inc. to construct a solid waste transfer station at the Clarkstown Sanitary Landfill site;

r. On May 18, 1990, the TOWN and Clarkstown Recycling Center, Inc. entered into their agreement providing for the construction and operation of a transfer station at the Clarkstown Sanitary Landfill and the transportation to and disposal at permitted landfills outside of New York State;

s. Thereafter, the TOWN commenced and completed the remediation of the transfer station site of approximately 7.5 acres and construction of

the transfer station began in the fall of 1990 and was completed by years end.

The TOWN looked very closely, indeed, at the potential environmental effects of its transfer station prior to undertaking the construction and operation of same.

15. In community recycling, Clarkstown stands among the leaders of Rockland County's municipalities. In 1988 the TOWN implemented its voluntary residential recycling program which was supplanted in 1989 by the TOWN's mandatory recycling program.[8] In 1988 the TOWN received permission of the state comptroller for the establishment of its refuse and garbage district and by contractual agreement with the Town of Orangetown dated August 22, 1990,[9] all acceptable solid waste generated or brought into those communities now flows through the

[8] The TOWN's voluntary recycling program predates the adoption of the Solid Waste Management Act of 1988. The legislative findings, L. 1988, c.70, § 1, underscored the need to reduce the generation of waste, encourage the recovery and reuse of secondary materials through recycling and related techniques, and foster conservation. Section 2 of L. 1988, c.70, provides: "The Legislature finds and declares that the proper managemnt of solid waste is necessary to protect public health and the environment. Toward this end, it is necessary to reduce the generation of solid waste, to accelerate the recovery and reuse of secondary materials within the state, to encourage the conservation of resources . . . and to encourage a new ethic among New York's citizens to conserve and reuse, rather than discard, useful materials. A state-local partnership is essential to achieving these ends". On September 19, 1989, the TOWN adopted Local Law No. 5 of 1989, now Chapter 82 of the Clarkstown Code entitled, "Recycling", wherein the TOWN implemented a mandatory recycling program (see the affidavit of Charles E. Holbrook, sworn to on March 18, 1991, submitted in support of the TOWN's application for a preliminary injunction).

[9] Clarkstown's sanitary landfill had been an integral part of neighboring Orangetown's solid waste disposal system for many years prior to closure (see "Order on Consent" dated May 16, 1980); logically, Orangetown elected to continue this relationship in requiring that all acceptable solid waste generated within Orangetown be transported and delivered to Clarkstown's transfer station.

TOWN's transfer station for baling and loading for transport to out-of-state burial sites. (Copies of Velzy Associates' "Plan and Report for the Establishment of the Town's Garbage and Refuse District" and the Department of Audit & Control's permit dated August 26, 1988 are annexed hereto as exhibits "O" and "P", respectively).

16. The TOWN also maintains two (2) composting sites where leaves and grass clippings are accepted for compost to eventually be returned to the soil as mulch and organic fertilizer.

17. Clearly, any argument to the effect that the TOWN neglected to take the requisite "hard look" at the environmental factors relating to the construction and maintenance of its solid waste transfer station and the concomitant transition of its solid waste management facility from a sanitary landfill to a transfer station, is erroneous.

18. In the adoption of its local law regulating the disposal of acceptable waste at the TOWN's transfer station, the Town Board specifically considered the facility's receipt of a permit from DEC and the procedures attendant to the issuance of such permit and that the action was considered to be an "unlisted action without any significant impact upon the environment" obviating any further processing pursuant to the State Environmental Quality Review Act (a copy of the resolution setting a public hearing pursuant to Section 20 of the Municipal Home Rule Law, dated December 18, 1990, is annexed hereto and marked exhibit "Q").

19. While it is beyond dispute that legislative actions are within the purview of SEQRA (*Niagara Recycling, Inc. v. Town Bd. of Niagara*, 83 AD2d 335, 443 NYS2d 951, 954), it is respectfully submitted that the Town Board's determination of non-significance in its adoption of Local Law No. 9 of 1990 entitled "Solid Waste Transportation and Disposal", should not be set aside. There is nothing in this record to suggest that the TOWN did not give the required "hard look" or that a longer or

more detailed study of the proposed local law was in any way warranted (*Niagara Recycling, Inc. v. Town Bd. of Niagara, supra,* at 955). The adoption of Local Law No. 9 of 1990 cannot be viewed as an isolated action by the TOWN as it constitutes just one element of the TOWN's integrated transition of its solid waste management facility from landfill to transfer station (*Vinnie Montes Waste System, Inc. v. Town of Oyster Bay,* [A.T. 9th J.D.], 1991 WL 30383).

20. Deponent must again stress that the defendants lack standing to challenge the adequacy of the TOWN's review of the entire project and that, in any event, the Court need look no further than the defendants' obvious (if not, in fact, admitted) violation of Chapter 106 of the Clarkstown Code prohibiting defendants' operation of a transfer station anywhere within the TOWN.

21. Neither the TOWN's zoning ordinance (*City of Columbia v. Omni Outdoor Advertising Co., Inc.,* —— S.Ct. ——, 1991 WL 41544 [April 1, 1991];), nor Local Law No. 9 of 1990 (*Town of Hallie v. City of Eau Claire,* 105 S.Ct. 1713, 471 U.S. 34, 85 L.Ed.2d 24 [1985]) run afoul of the anti-trust laws.[10]

22. As regards defendants' "second affirmative defense" averring the facial invalidity of Local Law No. 9 of 1990 and "other chapters of the Clarkstown Town Code", deponent can only assume that defendants allude to Article I, § 8 of the Constitution of the United States (the Commerce Clause). The TOWN's zoning ordinance enjoys a strong presumption of constitutionality (*de St. Aubin v. Flacke,* 68 NY2d 66, 76, 505 NYS2d 859, 496 NE2d 879; *Moran v. Village of Philmont,* 147 AD2d 230, 542 NYS2d 873, 875) and does not impose an undue burden upon interstate commerce (*Town of LaGrange v. Giovenetti Enterprises,* 123 AD2d 688, 507 NYS2d 54, 55; *Monroe-Livingston v. Town of Caledonia,* 51 NY2d 687, 435 NYS2d 966, 968; *Al Turi Landfill, Inc. v. Town of Goshen,* 556 F Supp 231, 238). Local Law No. 9 of 1990 regulates evenhandedly, without regard to origin, in its treatment of acceptable solid waste. In its application it does not look in a discriminatory or disparate fashion at acceptable solid waste generated within the territorial limits of the TOWN as opposed to acceptable solid waste generated or collected *outside* the territorial limits of the TOWN or, for that matter, outside of the State. Subdivision "C" of Section 3 requires the transportation and delivery of all acceptable waste generated *within* the TOWN to the TOWN's transfer station; Subdivision "A" of Section 5 calls for the disposal of acceptable waste generated or collected *outside* of the territorial limits of the TOWN at a "Town operated facility", *i.e.*, the TOWN's transfer station.[11] There can

[10] Presumably, this is what the defendants are asserting by their "first affirmative defense".

[11] Subdivisions "C" and "D" of § 3 of Local Law No. 9 of 1990 entitled, "Collection and Disposal of Acceptable Waste", state:

"C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility located at Route 303, West Nyack, New York or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code, except for recyclable materials which are separated from solid waste at the point or origin or generation of such solid waste, which separated recyclable materials may be transported and delivered to facilities within the Town as aforesaid or to sites outside the Town. As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown.

D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than the facilities or sites set forth in Paragraph "C" above".

Subdivision "A" of § 5 of Local Law No. 9 of 1990, states:

"A. It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, *except for acceptable waste disposed of at a Town*

be, therefore, no claim that the law is invalid on its face (*Niagara Recycling, Inc. v. Town Bd. of Niagara,* 83 AD2d 316, 443 NYS2d 939, 949, 950; *Al Turi Landfill, Inc. v. Town of Goshen, supra,* at 238; *Monroe-Livingston v. Town of Caledonia, supra,* at 968).

23. Local Law No. 9 does not conflict with the provisions of ECL Article 27 nor has the State preempted the regulation of solid waste management. Indeed, the ECL has expressly included local government in the regulation of problems endemic to waste management (ECL § 27-0711; *see Jancyn Mfg. Corp. v. Suffolk County,* 71 NY2d 98, 524 NYS2d 8, 10-12; *Al Turi Landfill, Inc. v. Town of Goshen, supra,* p.239; *Monroe-Livingston v. Town of Caledonia, supra,* at 968).

24. The TOWN unquestionably has the power to regulate the operation and location of transfer stations located within its territorial jurisdiction (*Town of Islip v. Zalak,* [A.D. 2 Dept.], 1991 WL 18606) and in today's society it can hardly be doubted that municipalities may regulate the disposal of refuse materials (*Town of Islip v. Zalak, supra*). The enactment of the applicable laws and ordinances (here questioned by the defendants) represents a reasonable exercise of the TOWN's authority to protect the health, safety and well-being of its citizens and the environment through the exercise of its police power (*Al Turi Landfill, Inc. v. Town of Goshen,* 556 F Supp 231, 239; *Moran v. Village of Philmont,* 542 NYS2d 873, 875, citing, *Matter of Town of Islip v. Caviglia,* 73 NY2d 544, 550-51, 542 NYS2d 139, 540 NE2d 215; *Town of LaGrange v. Giovenetti Enters.,* 123 AD2d 688, 689, 507 NYS2d 54).

---

operated facility, **pursuant to agreement with the Town of Clarkstown and recyclables, as defined in Chapter 82 of the Clarkstown Town Code, brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code".**

25. In light of the fact that the defendants are, daily, violating the ordinances and laws of the Town of Clarkstown, deponent respectfully requests an order granting summary judgment insofar as the TOWN requests a permanent injunction and directing that the defendants immediately cease and desist such violations and specifically prohibiting the defendants operation of a transfer station at their premises at 183 Western Highway, West Nyack, New York and the continued circumvention of the TOWN's transfer station facility.

WHEREFORE, deponent respectfully requests an order of this Court granting summary judgement permanently enjoining and restraining the defendants from maintaining an illegal transfer station in violation of Chapter 106 of the Clarkstown Code and the illegal transportation and disposal of solid waste generated within and without the territorial limits of the Town of Clarkstown in accordance with Local Law No. 9 of 1990 and directing that defendants immediately cease all illegal business operations at 183 Western Highway, West Nyack, New York or, in the alternative, granting plaintiff's application for a preliminary injunction, and for such other and further relief as to this Court may seem just and proper.

/s/ Murray N. Jacobson
MURRAY N. JACOBSON

[Notary Omitted in Printing]

Exhibit E to Affidavits Submitted in Support of Plaintiff's Application—Minutes of Public Hearing [142-159]

TOWN OF CLARKSTOWN
PUBLIC HEARING

Town Hall 11/14/89 10:00 P.M.

Present: Supervisor Holbrook
Council Members Carey, Kunis, Maloney and Smith
Murray N. Jacobson, Town Attorney
Patricia Sheridan, Town Clerk

RE: SPECIAL PERMIT TO OPERATE RECYCLING FACILITY MAP 80, BLOCK A, LOT 15 (C & A CARBONE)

On motion of Councilman Carey, seconded by Councilman Maloney and unanimously adopted, the Public Hearing was declared open. Town Clerk read notice calling Public Hearing and testified as to proper posting and publication.

Town Attorney read the following recommendations of the Clarkstown Planning Board:

1) Provide gratuitous widening of Western Highway, 30 feet from the center line of the road, and provide deed, title report and map with metes and bounds description for T.A. review and approval.

2) Subject to all requirements of Dept. of E.C. and subject to all requirements of the Rockland County Highway Department, since Western Highway is a County road.

Town Attorney said the DEC reported no environmental impact.

The County Planning Board approved subject to conditions:

1. The recommendations of the Rockland County Highway Department letter of July 5, 1989.

2. The recommendations of the Soil and Water Conservation District letter of June 30, 1989.

3. Obaining all required permits from the Rockland County Drainage Agency.

4. Obtaining all required permits from the Rockland County Health Department.

5. Guarantee that noise and odors do not adversely affect the nearby residential areas.

6. A traffic study be done to determine the volume and flow of traffic coming from this site. The study must take into consideration that there is a ban on truck traffic going into Orangetown.

Town Attorney read recommendations of the Rockland County Highway Department:

1. Provide adequate means of preventing dirt, dust and mud from being tracked onto Western Highway by vehicles leaving the site.

2. As the plans are developed, they are provided to this Department for review and comment.

3. A permit from this Department is acquired by the owners prior to the start of any construction on the site.

Town Attorney read recommendation of Rockland County Drainage Agency:

The above referenced parcel is within the 100 L.F. of 100 year flood plain of the Hackensack River. Therefore a permit from this agency is required.

Town Attorney read recommendations of the Rockland County Soil & Water Conservations District Board:

The dominate soil on the site is Riverhead, a very deep well drained sandy loam. Because this soil is highly permeable, the town should satisfy itself that materials stored on the site are not allowed to leach into the soil. This soil should be considered to be a poor filter so the potential for ground water contamination has to be addressed in the planning and design for this proposed site.

Town Attorney read comments from the Town Department of Environmental Conservation:

1. The entranceway to the site and the exitway from the scale area should be paved to prevent dust coming onto Western Highway.

2. If the berm along Western Highway is to remain permanent, we recommend planting evergreens.

3. The proposed retaining wall should be designed, inspected during construction and certified that it has been constructed according to the design by the registered N.Y.S. Professional Engineer.

Supervisor said the applicant will make a presentation. The Board members can ask questions of the applicant. Then any and all questions and comments from the audience will be heard.

Appearance: Kenneth Resnick, Esq.
Granik, Garson, et al
representing C & A Carbone

Mr. Resnick said the Board has in front of it the petition, the recommendations of the Planning Board and the various boards and agencies of the county. He said he wanted to address some of the immediate concerns. He said his clients intention as soon as the permit is granted, if the Board is so inclined, to immediately file with the Planning Board an application to totally enclose the facility so that it will at all times be free from any noise, dust and any odor. There will be no possibility of any

leaching or leachate simply because it will be all concrete floor. The present application is based upon the map as it is submitted in front of you but we have every hope and intention to developing a facility here for recycling in the method and manner which we are now utilizing but to be wholly enclosed. He said other than that he would rest upon the record that has been previously submitted to the Board.

Supervisor asked if the Board members had any questions.

Councilman Kunis asked how does totally enclosing stop odors? Mr. Resnick said it is an interesting phenomena that when you take material and deodorize it you stop the odor and if you keep it contained and provide deodorizers there is no smell. He said he could invite the Board to a couple of places that he is aware of that use those materials where it is effective. One is in Hillsdale and one is in Ramapo.

Supervisor said in regard to this facility you are talking about a recycling facility. Mr. Resnick said this is only recycling. This is not a transfer station. It is not permitted by the zoning law and it is not his client's intention to want a transfer station. Councilman Kunis said the property currently holds a permit for a transfer station from the State Department of Environmental Control, is that correct? Mr. Resnick said that was correct. He said he thinks you will find in that connection that that is the type of permit that comes out of Section 306 under the rules. That is essentially the permit.

Councilwoman Smith said are you saying that you have to have that permit to have a recycling permit? Mr. Resnick said no he is not but that is the permit that the DEC issued. He said his client applied for that back in 1987 but it wasn't issued until 1988. The limitations that existed between the zoning law and the application at the time were different. They were both the same.

While it talks about a transfer permit and all of the conditions under a transfer station would still be applicable—no odor, leachate, no effluent, none of that kind of stuff. The site itself is only for a recycling center and that is the methodology of the Department of Environmental Conservation.

Councilman Kunis asked what is the possibility of entering that site from east to west and not using Western Highway? Mr. Resnick said at this point it has not escaped our attention. He said we know who the adjoining owner is—Mr. Magee. He said that his client has effected conversations with him. They have gone nowhere at this point. There is a very long stretch of road that would have to be built—3,000+ feet and not an inexpensive road. We have not done any soil tests or anything like that but that is not liable to be compacted soil. It is liable to be mud and that would make it a very expensive road as well. There may be other alternatives rather than a straight line. He said he is not in a position today to represent to you anything with respect to the future in that other than it has not been lost upon his client and that there are and hopefully will be conversations that will go on.

Supervisor said in regard to the facility itself the concern about the traffic, aside from the odors, etc. has to be addressed. Regardless of whether this was built there or not the Board is concerned about that because Clarkstown is impacted by a ban and everything else. We have to attempt, between the Towns of Orangetown and Clarkstown, to resolve that problem with the truck traffic regardless of what is here. Mr. Resnick said on Western Highway, Route 303 and this whole package we may be able to facilitate that. He said he would point out one advantage that this site does have it is his guess that the availability of trucks to remove garbage from municipalities to distant landfill sites is going to be scarcer and more scarce. One of the current methods which is used now and it is nationwide is that truckers as almost a round

robbin—they go from one stop to another stop to another stop and somewhere in between those several stops, some of which may carry things we don't want to be in a truck that also carries garbage, to take material to landfill sites.

Mr. Resnick stated that we have a rail siding on that site. We believe that within three years costs of rail transportation vis a vis truck transportation will make rail competitive. Not because rail is going to get cheaper but because trucking is just going to get that much more expensive. That would eliminate probably close to a third of the truck motions that come about during the course of a day because that affords us an ability to transport substantial quantities by rail.

Councilwoman Smith said we must be made fully aware of whatever alternative plans you may have for traffic, other than Western Highway. Mr. Resnick said right now we have no direct access. We are limiting some of our truck movements by the sufferance of Mr. Magee. He allows us to utilize some of his property at different times and in different ways and allows us to go from Route 303 and limit our use on Western Highway. He said we have every intention of continuing but right now that is at the sufferance of Mr. Magee. It is not by contract and he said it is his hope that within the next short period of time perhaps that can be formalized but he cannot be put into a position to guarantee something like that. It is simply not something that he could guarantee.

Supervisor asked if there were any other questions from the Board. There were none. Supervisor asked if any member of the public wished to ask a question or make a comment?

Appearance: Mr. Stanley Hirsch
Western Highway
West Nyack, New York

Mr. Hirsch said he was in possession of a letter from Mr. Resnick to Mr. Bollman which say: "recognizing the circumstances regarding the landfill, as newspapers have reported it my client is in a position to offer the proposed facility as a transfer station to the Town." He asked Mr. Resnick is he wrote that letter and Mr. Resnick said absolutely.

Mr. Hirsch said Carbone has in his possession a permit to operate as a transfer station. He was surprised that Mr. Resnick did not try to deny that. He said he wanted to reiterate some of the points that the Town Attorney made before. He has a copy from the Rockland County Soil and Water Conservation District Board saying "There is a potential for groundwater contamination." They also require a traffic study to see the volume and flow, noise and odors—this is what you said Mr. Jacobson. That study has not been done, has it? Mr. Jacobson said he was not aware of it. Supervisor said it has not been done.

Supervisor said before any decision would be made a traffic study would have to be done. These are conditions. Mr. Hirsch said good, he wanted to understand that. He said discussion was had regarding tremendous truck traffic that we have on Western Highway so he knew that the study would not change anybody's mind on that. We have a lot of 18 wheelers going down Western Highway which is a residential area. We have the Carbone trucks handling recycling on Western Highway. They are very noisy trucks. He asked Supervisor Holbrook if the Journal News had lied the other day when it said that he (Supv. Holbrook) was offering Nyack the use of the Carbone facility for recycling? Supervisor said he did not see that. Mr. Hirsh asked the Supervisor if he had said that. Supervisor said part of the Village of Nyack is in the Town of Clarkstown so they would be part of our recycling and part is in Orangetown so they are part of both towns. Mr. Hirsch said Nyack is not currently using the Carbone facility so therefore we would

have an increase in garbage. Supervisor stated that if the Village of Nyack wanted to come with Clarkstown in terms of getting rid of its recyclables, since he favored recycling, he would not be opposed to that. He said he could not say what was quoted in the newspaper. But he definitely would say yes to the Village of Nyack if they wanted to come with Clarkstown. Mr. Hirsch said but you just said there is a tremendous amount of truck traffic on Western Highway. Wouldn't this increase it? Supervisor said he did not know if it would increase it that much. Supervisor said the recycling trucks which pick up in Orangetown and Clarkstown are similar. The Village of Nyack has a problem in how to go about enhancing recycling for pickup. He said if they wanted to come along with the Town of Clarkstown and enhance their recycling he would be in favor of that. We would probably use the same recycling trucks that we are using in Clarkstown because the agencies are the same.

Mr. Hirsch said obviously there would be an increase in truck traffic if they are handling another villages recyclables. Supervisor said obviously there would be some. Mr. Hirsch said he was working out in front of his house the other day and Carbone's trucks were going by every five minutes. Supervisor said the Carter's Association has the recycling trucks that pick up the recyclables, not the Carbone trucks.

Mr. Hirsch said he wanted to reiterate what was stated before. That the Carbone facility is within 100 feet of the Hackensack Creek and he said he believed across the street in the swamp the water there is used by Spring Valley Water Company and we have had trouble in that area before, especially on Pine View with all of the wells being contaminated.

Mr. Hirsch said if you give this permit we are going to have an increase in traffic, an increase in noise pollution, we'll probably have an increase in water pollution and all of this in a residential area. He said when he attended

a workshop several weeks ago a gentleman offered to have a facility in the Snake Hill Road area which is not residential, where they would be be able to use Route 303 and it wouldn't disrupt and pollute a residential area. He said he would like a recycling center and put in a transfer station at a later time you said we only want to talk about recycling at this point. Mr. Hirsch said it is fairly obvious from what is coming out here that recycling will lead to a transfer station. Nobody is going into the recycling business because there is no money in it. Supervisor said the only transfer station we are going to construct, and our zoning does not permit it in any zone, is the one that will be constructed at the landfill site. When we had the hearing and established the definitions and then later established the zones, the Town Board made a conscious decision not to include transfer station in any of the zones. That was done consciously. It was considered but it was also then considered to take that out.

Mr. Hirsh said he heard that but he also has the permit from Carbone to operate a transfer station. Supervisor said that was from the New York State Department of Environmental Conservation but you have to remember that at the time that was issued there was no such provision for transfer stations in the Town of Clarkstown. By creating definitions of transfer stations and then specifically not applying to any of the zones, now our zoning ordinance does deal with that particular issue. It was not dealt with at all in our zoning up to that point.

Mr. Hirsch asked the Supervisor to tell the good people of West Nyack why you are so in favor of having a recycling facility on Western Highway and still opposed to have it on Snakehill Road. Supervisor said he is in favor of recycling. Right now we have no place in Rockland County. He is in favor of taking recyclables so that they can be removed and we can expand our recycling for the benefit of not only Clarkstown but all Rockland County residents. We need a place to bring it.

This is a site we are considering. It is not necessarily the only site. The question of traffic which we have raised previous to this is one that he is concerned about. He said he did not think this Board is prepared to make a decision in regard to that. There are also other factors too. We are not prepared to make a decision favorable to this until such time as the traffic situation is resolved and that means trying to get the truck traffic off Western Highway. He stated that he has been saying that for some time and he would reiterate it now. It is a concern regardless of what is constructed at this particular site. If it was a row of stores, we would be talking about the same type of traffic and it has to be worked out between the Towns of Orangetown and Clarkstown.

Mr. Hirsch said you still have not answered my question and he was getting a little tired of asking the same question over and over and having you dance around it. Supervisor said he is not dancing around anything. Supervisor said you are assuming something. He said he favors recycling. If he could eliminate the truck traffic on Western Highway he would be in favor of having a recycling place where we could take Clarkstown's recyclables. If this happens to be a place, he has to consider it. It is not necessarily the only place to be considered.

Appearance: Ms. Florence Zuvich
Blauvelt, New York

Ms. Zuvich asked approximately how big Clarkstown is? Supervisor said it is 42 square miles and 82,000 people. She said out of 42 square miles you have 8 toxic sites in a radius of maybe 3 miles. She asked why out of 42 miles would you even consider adding to the problem we've got. She said you keep trying to say Carbone is only recycling and you keep saying that your transfer station is going to be at the Landfill. Supervisor said that is correct. Ms. Zuvich said she wanted to clarify what she thinks.

Ms. Zuvich said you have stated that they will become probably County facilities eventually. Supervisor said that is correct. Ms. Zuvich said that Mr. Resnick also said that eventually railing it out will be cheaper than trucking it out. Hence, maybe the meeting with the people in Pennsylvania. Ms. Zuvich said if you look at the Carbone site and she did not know how many acres it was but it is not really that large, it cannot possible facilitate a County facility. The site for the so-called transfer station is also not big enough to hold a County facility. You will then have to graduate toward the middle of the map. We also know who owns the property in the middle of that map. The Magee Brothers.

Ms. Zuvich said if you look at the map the rail is directly behind Carbone and not by the proposed transfer station so if you are going to put the transfer station on Route 303 by the Landfill you will still have to truck it or move it in some way to the rail site which has got to be maybe 100 feet or so from Western Highway. Supervisor said our intention from the Town's point of view with regard to the transfer station on Route 303, is to bring the garbage, that is not recycled, to the site and then transport it by truck, not by rail, to a permitted facility which would probably be outside of New York State. This could be Pennsylvania or even Ohio. Ms. Zuvich asked is the rail supposed to be just for recyclables? Supervisor said their specific site was for recyclables. The Town of Clarkstown is not involved in the rail site. Ms. Zuvich said you have listened to that option of railing it. Supervisor said we have but the problem would be crossing the Landfill and the wetlands with a rail spur. He said we would not really be able to do that. Ms. Zuvich said that was her whole point. You would not be really connecting it. That transfer station would have to grow in order to accommodate a County facility. Supervisor said we are not looking to accommodate the County facility. Ms. Zuvich said but you will, eventually.

Supervisor said Orangetown and Clarkstown have been basically wedded together with regard to garbage for a long time, with the Landfill and ultimate with this station. What we are looking to do is to provide a facility at the location of the Landfill which would accommodate both the Towns of Orangetown and Clarkstown at that site. Ms. Zuvich said but did you not say that eventually you would go with the County facility? Supervisor said absolutely and what he envisions the County plan to be is that probably somewhere down the line in the Town of Ramapo there would probably be using their baling station or they would make it into a transfer station which would be another location for Ramapo and probably maybe even Haverstraw to use it as a site if they in fact have to truck garbage out of New York state. Supervisor stated that the Town Board here is not looking to make the facility and we have not applied for it in those terms. We are only applying for the Towns of Orangetown and Clarkstown and there is no intention to do that. Ms. Zuvich said she went to the County meeting on solid waste and the main applicant for the center was Carbone and no other was mentioned. She said also as we know one way of getting around SEQRA is saying that you have an existing facility. So you will have an existing facility there so that when the County wants to come in and expand there is little doubt that DEC will accommodate. Supervisor said one other point—add to that—going down the road and we did ask the question of the DEC at the Landfill site in West Nyack but we were talking about the transfer station. We did raise the possibility of that location having a recycling facility adjacent to the transfer station but in trying to move the application along they told us not to apply for that at that time. Ultimately, the Town of Clarkstown might decide that we want a recycling facility right at the Landfill site for Clarkstown's recyclables. The DEC recommended at the time we talked to them against making that application simultaneously with the one for the transfer station.

Ms. Zuvich said she understood that but also she said you just said about moving it to the Landfill site. She said she sincerely doubted that if Carbone is putting in that amount of money to start it you are not about to pull it away from them. Supervisor said we have said even over at the County, that when the County does come up with their plans ultimately for whatever they are going to do with solid waste which is not really formulated, and may never be formulated in this decade, the Town of Clarkstown is prepared to cooperate with the County of Rockland in whatever endeavors they do but that is not for the foreseeable future. Essentially we are going to construct our transfer station and maybe even try to make a recycling thing there ultimately at that location. Ms. Zuvich said the DEC permit expires in 1992 which is when the County facility is supposed to go on line. Supervisor asked what County facility would that be? Ms. Zuvich said the County's target date is 1992 and it seems curious to her that while you advocate having the County come in that Carbone's DEC permit would be expiring just at that time.

Appearance: Mr. Peter Beaton
Western Highway
West Nyack, New York

He said we have a Supervisor who is highly interested in recycling and Carbone wants to put a recycling plant on Western Highway. It follows that it is logical that we will increase dramatically, again and again, the amount of recyclables that are brought along Western Highway. Is that true? Mr. Resnick said he supposed you could say that. Mr. Beaton asked Mr. Resnick if it was not true that his plan is for the trucking out of stuff that has already been trucked over Western Highway and the railway has little impact on the people who live on Western Highway and their children? Mr. Beaton asked who is pulling the wool over whose eyes here with this recycling plant. If they get this foot in the door and we will have

the transfer station just as we have the stinking stench tonight on the dump that is supposed to be covered. Go by it, tell me how you are going to take care of our problems. The area stinks every day.

Supervisor said with the approval of the Town Board he has signed a Consent Order to close the Clarkstown Landfill and we will be undertaking a rather expensive and lengthy remediation of that site. We are not oblivious to the environmental problems that the Landfill has caused over the years. He said we must consider that the Town Board has taken this measure and this Landfill site will be remediated and there will be relief. He said he was saying this in all sincerity. It is not going to happen ten years from now. It is going to happen starting in 1990. In terms of odors and whatever problems are there we will have to see what has been dumped there over the course of fifty years, etc., that has to be remediated. Knowing where you live and knowing that you have lived with this for a long period of time, the remediation of the Landfill site will, in the long run and in the immediate run, improve the situation there. He said we have done that. Mr. Beaton said you have promised to do it. Supervisor said we have done it. He said he is not saying there isn't odor from the Landfill tonight. But he is saying that with the remediation of the site in 1990 the conditions to which you are referring will be improved. We have consciously attempted to do that. Mr. Beaton said the DEC did that for us. Supervisor said instead of fighting them in the courts and delaying it ad infinitum the Town Board did not choose that option. We chose the option of approving a Consent Order and signing it so that the Town of Clarkstown would be eligible to be reimbursed for the cleanup of that site and it would happen immediately, not years down the road. Supervisor said he wanted to make that comment. It is not as if we are saying we don't care what happens there. We do.

Mr. Beaton asked Mr. Jacobson, Town Attorney, where the 30 foot widening on Western Highway was supposed

to take place? Is it the entire length of it or just in front of Carbone? Town Attorney said this is in the recommendations of the Clarkstown Planning Board and he would assume it is only for a short distance in front of the Carbone property. He did not think they are talking about widening the whole of Western Highway.

Appearance: Mr. John Cuff
Pheasant Drive
West Nyack, New York

Mr. Cuff said we are light years ahead of the program. He asked what it costs his household per week to get rid of newspapers right now? Supervisor said he could not say offhand what it costs but that we do get $10.00 a ton for the newspapers. When the Landfill closes and we have to truck that to some location for about $80.00 a ton every ton of recycling that we do or we take out of the waste stream would save the taxpayers of Clarkstown $80.00. Mr. Cuff said that is very easy to say but he said he thinks it is costing him, homeowner, probably a couple of dollars a week to get rid of ten pounds of newspapers. So if we were to figure that out at $2.00 for ten pounds a hundred pounds is going to cost me maybe $10.00 or $15.00. If you get up to a ton it's going to cost him well over $100.00 which is more than the cost of virgin material to make newspapers. Mr. Cuff said he takes what is going on right now as a big psych job. We are paying a fortune to get rid of newspapers that there is no market for anywhere in this country. It is costing him and every homeowner to go along with this recycling. kick and we are paying more to get rid of it than the market price is if there was somebody to buy it. Unfortunately, there is very little market to buy newspaper print. It has to be dry, it has to be bundled and it has to be weighed. What we have created is a beautiful thing. Oh! We're recycling. We're environmentalists. We're concerned. But we are paying ten times what it would cost us if we just put it in our garbage can every day.

Now, we are on a clear glass kick and he did not know where the market is for clear glass. He said he did not know what we get a ton. It costs money for them to stop at his door every Tuesday and pick up the clear glass. He said he knows it costs a lot of money to come and pick up the newspapers every week. Then it is all taken off. Do we know where this stuff is going? You were always concerned about where our garbage is going. Where is our newspapers going? Supervisor asked Mr. Bollman, Director of Environmental Control to tell Mr. Cuff where the newspapers were going. Mr. Bollman said newspaper is given to Garden State Paper Products. We deposit it at the Thruway Recycling Center which is part of Garden State Paper. Mr. Cuff said and we are being paid for that newspaper. Mr. Bollman said that is correct. Mr. Cuff asked what Mr. Bollman would say we are making per ton on newspaper right now, taking labor, transportation costs, costs of the truck and everything else into effect and the cost to the homeowner, how much are we making per ton on newspaper? Mr. Bollman said he did not have those figures but he wanted to address Mr. Cuff's other question. It might be more costly than to make virgin paper but if we are going to pay, say $100.00 per ton, to get rid of garbage—newspaper being part of that—and your newspaper can be collected for $70.00 per ton and can pay $20.00 per ton for Garden State to taken it away from me because I might have to pay them soon to take it. That is still $90.00 versus $100.00 and he would have to argue with Mr. Cuff it's better for the taxpayer to get rid of that paper at $90.00 a ton than it would be to throw it into the garbage and transfer it to Ohio at $100.00 per ton.

Mr. Cuff said talk is in New York City they are going to start mandatory recycling of newspaper out of New York City. Do you think that might have a slight impact on the newsprint market—waste print. Supervisor said absolutely. Mr. Cuff said if there is any kind of success with the recycling of newsprint out of New York City

we are going to be paying a fortune to get rid of newspaper. Mr. Cuff said no one is more concerned about the environment than he is. He was born and raised here. Mr. Cuff said we put the cart in front of the horse. We are very chic by recycling but we are being conned all the way. We are paying an exhorbitant price to get rid of it now and if these other townships and municipalities and if New York City climbs on the bandwagon and gets into recycling it's going to wind up costing us three times as much to get rid of newspapers as it is if we would just throw the darn things into an incinerator or mass burn facility and get rid of them. Mr. Cuff said he remembered back to 1946 when the mill in Piermont was running twenty-four hours a day, seven days a week for the war effort. Right where Manley Chevrolet sits right now was a big tin storage shed where all the newspaper came in for the war effort and was transferred down to Piermont to be recycled in the mill. All of sudden the war was over. There was no market whatsoever for newspring. Do you know where it all wound up? Right over where we have our Landfill right now. That's that base coat of our Landfill because there was no market for it in 1946. If there is ever a concerted recycling effort by municipalities like New York City or Yonkers, etc. we are going to be paying ten times as much as we are paying right now to get rid of newspapers. Leaves—that's a whole other chapter. These people probably don't even know it but we are importing leaves from New Jersey now into West Nyack because we are going to set up some kind of a composing facility by importing leaves from New Jersey into West Nyack.

Supervisor said in regard to recycling, the State of New York, Department of Environmental Conservation, has required all municipalities in New York State to recycle. We have a mandatory recycling law in the Town of Clarkstown. When our Landfill closes we would then have to truck, if we did not recycle which we are doing now, 100% of our solid waste out of state which would

jack up the cost of garbage disposal tremendously. Recycling has to be done and it must be done. He did not say that this is the site it must be done at but regardless of that it must be done. The Town of Clarkstown will do it. Town of Orangetown is doing it and our programs are very similar. It has to be enhanced because when our Landfill closes Orangetown's source of getting rid of their garbage also goes away. They must come up with an alternate. We must recycle regardless of what happens with the Carbone Recycling Facility.

Mr. Cuff said he envisions the day when Ohio and Pennsylvania and Iowa and all these other states are going to turn around to the State of New York and say solve your own problems. Supervisor said he agrees with him. Mr. Cuff said we should not be going too deep into this stuff. He said he does not think Albany has all the answers either. They've never had the answers on anything else so he did not know where they would have the answers on recycling.

Supervisor said we must recycle.

Appearance: Wayne Gavioli, Esq.
representing the Blauvelt
Association residents from
Orangetown

Mr. Gavioli said they have long advocated a recycling program and when many officials could only think of incinerators and placing that incinerator in West Nyack, we joined with our brothers and sisters in West Nyack and successfully opposed that plant. When others were thinking about other sites for incineration we were in Albany lobbying for DEC regulations that would preserve the environment for all people in the County of Rockland and the State of New York. He said their record of advocating and promoting recycling is a long one, one that we took long before most of the elected leaders here in the County. Even today we are consulted by many of the

people at the County level concerning recycling. He said they oppose the application for the special permit tonight because they have always felt that you do not solve one problem by creating others. He said they see the very real need for a recycling center but we say this is the wrong site. We cannot understand how a determination to place a garbage center for recyclables items, first of all, can be made without a full environmental impact statement. Secondly, he said they indicate to you that there is a very fine line indeed between recyclable garbage and non-recyclable garbage. There are many people who indicate that 90% of the waste stream is recyclable. He said he sees the day when this Town will be boxed in to the very real situation of just what is a recyclable. How will you monitor this recycling center? How will you deal with what is or is not recyclable? Who is going to distinguish it? Who is going to go to Mr. Carbone and say this is a recyclable but this is not when there is no unanimity of opinion in the scientific community today. The very real possibility exists that what you will have is in name a recycling center but in actuality a garbage center. History has taught us to be very wary indeed of applicants who have tried to operate private recycling centers. Unfortunately, the history is not a good one. Only too recently a great deal of publicity was given in the mass media concerning a recycling center located in the State of New Jersey. That was licensed, that was approved and it was supposed to be for recycling. We know the story that what it became was what this might very well become—a garbage dump. For two years the municipality, its Town Attorney, its municipal attornies and the town fathers tried to close it down. For two years they were unsuccessful. The result was the great fire that did take place which resulted in the burning of steel and the twisting of metal on the highways in New Jersey. We know that this is not the only center where this has happened. It has happened in other locations here in the State of New York, most recently out on Long Island.

He said we know too that this applicant has already indicated to the DEC that this is not going to only be a recyling center. For this evening it is. For the DEC it was going to be a waste transfer station as well. That is his application. Those are in fact his words, not mine. He said the intention is obvious. It was stated hereby a prior speaker that this is the attempt to get the foot in the door. Mr. Gavioli said the application itself has been an indication that there is an approval from DEC—Assemblyman Hinckey, Assemblyman Coleman and DEC regional personnel have looked into this on our behalf. They have indicated that the application itself seems to be fraught with irregularities. One of the irregularities is that at a time when this Town did not permit a recycling center for the transfer station, the application was made and granted without any knowledge to the DEC that it was not permitted under your zoning code at that time, something that it is customary for DEC to be advised of and important in its determinating process as to whether or not to grant those permits.

In answer to a question from Councilman Kunis, Mr. Gavioli said there is no specific question but a series of questions relating to municipality and the right to use this particular use there. There is not a specific question no. Mr. Gavioli referred to a DEC memo that they received on November 10, 1989 which he would get back to in a little while.

Mr. Gavioli said it is obvious, he thinks, moreover that the application which was made to DEC is fraught with even further irregularities. At that time it was indicated that the maximum would be 50,000 cubic feet which as DEC regional personnel indicate is mere pittance and far, far less than anything anticipated at the current time. Mr. Gavioli said he knew that Mr. Resnick has indicated that this will be a wholly enclosed facility. In point of fact, DEC's revised regulations now mandate that so there is nothing that they are doing gratuitously. It is something that DEC has decided must be done.

Mr. Gavioli said your own Town Planning Board has highlighted for you very clearly that although we may wish and we may hope the reality is Western Highway will be the means of ingress and egress. They indicate to you in their own memorandum that it will require a widening of Western Highway so that we know where all this truck traffic is going to come and it is going to go down and most importantly impact the communities surrounding it. He said as far as what is going to happen with the Magees, etc., gentlemen and lady of the Board, let's not fool ourselves. These negotiations and discussions have been going on since the summer. They bore no fruit. Let's not misrepresent that in fact tomorrow everyone is going to sit down and we are going to resolve this. For a period of many months this has been ongoing. It has not been resolved and he, would daresay it is not going to be resolved. Just to highlight for the record, the County has indicated that this is within 100 linear feet of the flood plain. Of course, the County's own Highway Department has concern too about the dirt, the dust, the mud being trucked onto Western Highway. In point of fact, Thomas Gill, Principal Engineering Technician, of the County Highway Department sent no less than five (5) memorandums to the Town of Orangetown indicating that roadway is incapable of handling any additional truck traffic.

Mr. Gavioli said finally he would refer to a several page letter which he received from DEC, Alexander J. Cresluk, Jr., Deputy Regional Permit Administrator dated November 10, 1989. He stated that Mr. Cresluk is concerned by this proposal and indicates his concerns are for the potential spills and waste leachate leaving the property. He indicates furthermore that they are not necessarily going to go along with this as 50,000 cubic feet would be minimal amount far less than what they anticipated and "We will request the Town of Clarkstown provide specific information to us regarding the proposal it

is presently reviewing so as to determine whether this proposal in fact meets DEC requirements at this time in view of these concerns."

Mr. Gavioli said it has been mentioned and Mr. Jacobson has raised the point and he (Mr. Gavioli) will answer it whether or not there is a truck ban in the Town of Orangetown. The answer is yes there is. It was recently enacted several weeks ago. He said it seems inexplicable to him that this Town Board and your fellow Town Board members in Orangetown which only recently found that there was too much truck traffic on Western Highway and enacted a truck ban, in an area in which we are now talking about locating a facility that could only do more damage and increase that traffic. He said quite frankly this application has a pungent stink to it and he thinks it smells like garbage.

Appearance: Mr. Kalinowski
83 Western Highway
West Nyack, New York

He asked how many of his neighbors were here tonight and asked them to stand up. He addressed the Board and said that they were impacting his and his neighbors lives. He said we have our houses here and we will be in this area for a number of years. He said you are deciding on our fate and on our children's fate. You are increasing truck traffic immensely. You have to get together with the County. Business sense usually dictates that volume production reduce costs. You are going to do it alone and all the other towns are going to do it alone. He said he did not think so. He thought it was going to be in his backyard. He said he would like to know how and why you can offer up a facility of a private company to another town? You are offering their business.

Supervisor said what he is saying to the Village of Nyack is that if they want to come along with Clarkstown with regard to recycling they are welcome. We have to

recycle regardless of this application. If the Town Board turns this down we still have to recycle and his offer to the Village of Nyack if they want to come with us and use the same system we are using is fine. We are not oblivious to what people are saying. Otherwise we would not be engaged in public hearing. If we decide that because of traffic or any other reason that this should not be done here we still have to recycle next year.

Mr. Kalinowski said you do not have to impact the environment one way to resolve a problem that already exists and you are going to impact the environment. He said he also has the application to the DEC and if you will note on that every question is answered with no impact. There is impact. There is impact every day that extra trucks go down that road. You have allowed a mall to be considered to come in here now. Western Highway is the connector down into New Jersey. There are as many Jersey plates coming up that street now as ever and there will be more because it is a real convenience to get away from Route 303 and the death trap that exists there. There is no lights. You can travel it cleanly. The truckers know it and they use it. You promised me it would stop at the last meeting and you haven't done it. Supervisor said we have had enforcement out there. He said he could not guarantee 100%. Mr. Kalinowski asked if this recycling center had gone out to open bid—is this a competitive bid basis? Supervisor said this application is a private matter. Mr. Kalinowski asked if he was wrong in the assumption that any business that the County or the Town gets involved with usually goes out on competitive bid basis. Supervisor said if it exceeds the threshold on the bidding which is $7,000.00. Supervisor said this would be a contractual thing based on the price of it but it could conceivably go out to bid, yes. Mr. Kalinowski asked why couldn't it go out to bid. Supervisor said because we don't even know if it is going to be there. Mr. Kalinowski said what if somebody comes in with a lower

bid and it is someplace else. You are not opening up all of the possibilities is what he is getting at. You are situated at one site now. You have an offer of Snake Road. Put it up to competitive bid between the two guys. Let them run it from the current dump. Supervisor said that is an alternative and Mr. Kalinowski said it is an alternative that is not being pushed right now. This is just something that is going to lay down there and if these people don't stay on your neck every damn day of the week it's going to be on Western Highway and we are going to be on your neck. He said he has tried to call and ask Mr. Grant to come in. He's been on vacation. We had a hard fought victory. We need the Town and the County here together communicating. It's not happening. All you have is West Nyack and Western Highway fighting you and fighting the Town Board to reduce traffic. We suspect that there will not be a connecting road coming through. You have open land available. He said he has not heard the Supervisor once this evening ask these gentlemen to contract out with you to run a recycling facility on a site that is already a dump. Why does he have to put it on Western Highway when you can use the dump right now. Supervisor said he is applying for it there because he owns the property. Mr. Kalinowski said let him leave his trucks there right now just as he always has. Let him contract out to manage the service on Route 303. Why not? Supervisor said you are assuming that the Town is just going to pass on this special permit. The Town Board has not made that decision and the purpose of a public hearing is to get input from the public. You were here a couple of months ago. We told you there would be a public hearing. That is why you are here. That is why we are listening. Again, the traffic situation which you raise on Western Highway would have to be dealt with regardless of this facility being proposed. That is a problem that has to be dealt with regardless. We have to recycle also, regardless. You have mentioned some other alternatives. The Town Board has to take that into consideration. It

will. Mr. Kalinowski said he hopes they do and he hopes they keep it off Western Highway. We really don't need it there and there are better alternatives.

Appearance: Ms. Maria Hertz
95 Western Highway
West Nyack, New York

She said she would like to congratulate her fellow citizens who live on Western Highway for the very good job they are doing compiling information. The first meeting we attended we were totally raw. We did not know what was going on because we were innocent enough to trust you, our representative. Now we found out that we couldn't do that so we started digging for information. We have done an excellent job. She said she wanted Mr. Holbrook to know that no one is out to get him. There have been some harsh statements made and she wanted to tell him why. She said the first meeting when everybody complained about the traffic you told us you were going to do something about it. Within two days there was a sign on Doscher Avenue and Western Highway stating that Five (5) ton trucks were allowed. She said not a single violation or summons has been issued to any sixteen wheelers passing by. What is the use to have a law if it is not enforced. She said Mrs. Smith was the only one on the Board who accepted her invitation and came to her house. While she was there in five minutes we counted seven sixteen wheeler trucks going by.

She said she would like the Supervisor to answer their questions and not be referred to Mr. Bollman all the time. She said she was speaking not from papers but from her heart. She asked him to please consider the health of their children and themselves. She said the people in the rest of the Town, Congers included, have been silent on what is happening to the people of West Nyack. But if this facility goes in there everybody is going to be affected—healthwise for everybody. She appealed to the

Town Board from her heart and asked everyone of them to vote from their conscience not to back up anybody else.

Appearance: Mr. Bruce Broadley
West Nyack, New York

Mr. Broadley said here we go again looking at a special permit to create some wealth for somebody else—for a property owner at the expense of the homeowners in the area. This time the creation of the wealth would be affecting not so much the pocketbook but the lives of the people. Western Highway is a busy highway. It has trucks on it. Unfortunately we don't do too well in our negotiations with the other towns—Orangetown or Ramapo. They always seem to get the best of us. There is a limitation on the road. Unfortunately, the Clarkstown police don't really enforce it, because as we all know the Clarkstown police's job is (1) being arrogant to the citizens and (2) chatting with each other and (3) having coffee and that is the impression you get of them as you go around the town. It is quite apparent. The current recycling program is an interesting kind of thing. It isn't too effective. He said he had a lot of recycled goods this week. The blue box was filled up with newspapers and we had some clear glass which we put in a bucket and put it right next to it. Unfortunately the bucket was brown so they didn't take any of the glass that was right next to the papers. That's the way things go in the Town. Supervisor said they should have taken it.

Mr. Broadley said we see that West Nyack gets a lot of this stuff. They get the Pyramid Mall, they get the dump, they are going to get the transfer station and they are going to get the recycling. Dump everything in West Nyack rather than in pristine New City. It's no secret why New City doesn't get anything. If you look at the demographics of Clarkstown every politician knows that an election can be won if you carry New City and New City has more votes than the rest of Clarkstown com-

bined. You have more population than the rest of Clarkstown. Look at the Rockland County Census. That may be wrong too. Again, it is a government report. That's why pristine New City doesn't get things. They have the population. They have the power base. What you are forcing us to do and as we get down the pike and get more and more of this crap you are forcing West Nyack to really seriously consider incorporation as the Village of West Nyack. The Village of West Nyack will take tax revenues away from Clarkstown because we would do certain things ourselves. In today's atmosphere where we just want to control zoning, the Village of West Nyack would seek to have borders which would capture properties such as Pyramid and capture properties such as the Town dump and the recycling things within their boundaries so that we could not only have appropriate zoning but so that we could have an aggressive and strict and enforceable village code contrary to what is currently done in Clarkstown where the town code is many times not enforced. This is what you are doing to us and what you are going to have is the same phenomonon you had in Ramapo. We have had a lot of inquiries from Congers, from Valley Cottage, from Nanuet and as you know in Nanuet, Mr. Teplitz is looking into that. You are going to have a situation where there is going to be villages and Clarkstown proper will be New City. You are forcing us into that if you don't start responding to the needs and requests of the West Nyack citizens.

Appearance: Mr. Ted Galloway
24 Green Road
West Nyack, New York

Mr. Galloway said his street is just north of Carbone and is probably known to you as a dangerous intersection. He said he wanted to give an example of the problem in response to the request for this facility. He said his wife was involved in an accident at the corner of Western Highway and Green Road. She is fine but we keep get-

ting more trucks coming down Western Highway. He said the next foggy morning, of which there are many and a five or ten ton truck comes along, she isn't going to be here.

Appearance: Ms. Maryann Brancatelli
2 Hobbe Street
West Nyack, New York

She said she has called the Supervisor many times about garbage being picked up at 3:00 or 4:00 A.M. She said she wanted to know why and where it is going. She asked if there was anyone who could answer that. Supervisor asked if she was talking about the Carbone facility. She said they pick up at at time at the medical building. Many of them have called the police and it stops for a while but then it continues again. Why are they even allowed to pick up at 3:00 or 4:00 in the morning. The Supervisor said they shouldn't be. We have looked into it. He said he did not have a good answer for that except it shouldn't be. She said she hoped that would be resolved soon.

Ms. Brancatelli said they are against the proposal for a transfer station here in West Nyack. She said we already have the dump and now the idea of a transfer station transferring trash to our community is outrageous. She said they are tired of having such a fine community become the butt end of Rockland County's woes. She said they were tired of having anything dumped upon us against the democratic wishes of the community. A transfer station brings with it an air of ugliness and the sense of community is becoming environmentally unsound. She said with the opening of a transfer station comes along the problems of added truck traffic along Doscher Avenue, Western Highway and other nearby roads. She said we are intolerant to this scourge. The tractor trailers and trucks traversing across these streets pollute enough diesel smoke to fuel the entire steel city of Pittsburgh and

she asked the Supervisor if they have to be forced to breathe any more toxins? She said also remember the fresh air of the spring, the crisp air of the fall and the memories they bring to mind. Well, the only memories we have are the dirty polluting air being inhaled into the lungs of our children and the filthy diesel smoke hovering over our homes. Is the stuff we want our children to grow up in? Is this the stuff we want in our future? In the Sunday New York Times they have a section which asks Would You Like to Live in—and there was a section once regarding Nanuet. They said in it, besides Nanuet, the Town of Clarkstown includes—and they named the hamlets. West Nyack wasn't even mentioned. We didn't even exist. In the eyes of Clarkstown we seem to exist only as a doormat for all to wipe their feet on us. She said right now she can't even open her doors and windows because of the fumes that come pouring through. This summer, she said she was eight and nine months pregnant and could not even use her house fan. She was a prisoner in her own home because all the fan brought in was fumes, not only from the trucks but from the dump. Don't create problems without solutions. We have eight toxic areas in about three square miles. Think about all of us in Clarkstown and don't forget about us in West Nyack. She said she wants to live and not die with her family in her community.

Appearance: Ms. Mary Kuhnar, President
Association of Residents in Blauvelt
Blauvelt, New York

Ms. Kuhnar said Councilman Kunis asked a question about specific questions on the DEC permit application for an environmental assessment form that was filled out by Mr. Carbone she would assume. She said there is one question which asks were any permits needed from the town and did he have them and Mr. Carbone answers yes and the permit number is 75-711 which should be checked into. We will provide you with a copy of this.

Councilwoman Smith said 75-711 is a building permit for the garage. Supervisor said that sounds like it was issued in 1975. Ms. Kuhnar said this was the permit which he presented to the DEC as his right to have a transfer station. Supervisor asked if Mr. Carbone submitted that and Ms. Kuhnar said yes. She said she would like to add that she feels very sorry for the residents of West Nyack for what is happening to them and has been happening to them in the past. She said she wished the Town Board would listen to them because you can find alternative ways to have a transfer station. Have it on Route 303 but do not subject these people to the kind of truck traffic they are going to have from the garbage trucks that will be coming from all over the county. She said she is sure that will happen if this goes through.

Appearance: Mr. Frank Winbush
58 Western Highway

Mr. Winbush said he works at Stewart International Airport and right below where he works there is a recycling and transfer center. It started out as a recycling center. Now it is a transfer station. He said you should reconsider putting it on Western Highway because of the truck traffic. He said every morning when he goes to make that turn to go into the airport he is either behind trucks or people from the area who are taking papers or recycling glass or whatever to dump it off there. The truck problem wouldn't be your biggest problem although they do spill things on the road. A couple of times people have gotten into accidents because it was foggy. He felt it should be at a better site. He said where he works is right next to Route 87 (New York Thruway) and they are going to build a hotel there so in the future they probably will get rid of that transfer station because he said he was sure that people who come to that airport on business will not want to look out their window and see a transfer station. It would be better to have it somewhere else. He said where he works Route 84, Route 87, Route 9W there are tons of trucks coming all over that

place. He said sometimes he is late for work just because he is stuck behind these trucks either because they are either too slow or they have a heavy load that they shouldn't be carrying.

Mr. Resnick spoke in rebuttal. He said he understood the emotion of the issue. He said he also understood how hard pressed the Board is and how careful the Board will be in making its determination in all respects. He said the first thing that concerned him was the 50,000 cubic feet of the proposed application. He said he did not have the application but would get it from Mr. Carbone tomorrow. He said it was Mr. Carbone's recollection that the application for for 48,000 cubic yards. He said 50.000 cubic feet is miniscule relatively speaking. Councilwoman Smith said they may have forgotten the amounts but she believed it was less than 12,500 tons or 50,000 cubic yards. Then what you apply for is considered a minor application. Mr. Resnick said that was correct. Councilwoman Smith said under those circumstances no municipal agency is notified that this is even applied for. That is something that has to be changed today because she did not think the amount that we are dealing with but the fact that such a site is coming into this municipality. She felt every application should be notified through the local municipality.

Mr. Resnick said you may be right and it may well be that it is time that particular aspect is changed so that there is communication much in the way of a 239 review where all affected localities or municipalities have the opportunity to give input at the initiation stage right from the beginning so you know where you are and you can stop something that may prove to be imprudent at the earliest possible opportunity. We are not dealing here with a transfer station or garbage site. We are dealing essentially with a recycling center that takes various kinds of materials that are capable of being reinserted into the stream of commerce and reinserts them in one form or another, whether it be wood, paper, plastic, glass, metal,

aluminum in whatever form and that is the purpose of the site. Mr. Resnick said he had no problem with the definition of recyclable. He said he knows what the ordinance says and he knows what common sense says and it means to reintroduce materials back into the stream of commerce not to bury them in the ground. He said he does not have that kind of concern but he understands the constituency's concern. Garbage is not a pretty subject. We want to take our packaging, throw it away and make it go away but it doesn't work like that. We are a package conscious society. The problem that Clarkstown faces is a national problem. There are all sorts of solutions being offered. The real question he supposed was why doesn't the federal government and the state start doing something in a comprehensive way rather than leaving the it to local government and this kind of trauma that we face here tonight. He said with respect to the inspection of the facility he has a great respect for the enforcement arm of this Town. He has seen it at work. As part of any permit that site is open on a virtual 24 hour basis for inspection by any member of the Town of Clarkstown who is authorized to do it, by any member of the DEC who is authorized to do it, by any health inspector of the County of Rockland. In terms of inspection for management and maintenance it is open. It is there. It has to be. It can't be conducted any other way. He said with regard to the question of the trucks. He said he has no knowledge as to what the details of the impact of the various improvements which the Town may have on Western Highway. Nor is he privy to any of the potential solutions. He said he did recall hearing one of the neighbors complaining not about the Carbone trucks but about other trucks and that is a point that he asks the Board to keep an open mind on. He said we are but a miniscule portion of the truck traffic and we probably ride at hours when we don't impact truck traffic. Much of it would be early in the morning, he would suspect.

Mr. Resnick said he knows that the Board is familiar with the site. If the Board believes that a traffic study is necessary he can understand that. He said he does not want to pay the expense of it because traffic studies are notoriously expensive and what they confirm is that the road is inadequate and that somebody ought to turn around and improve it and then it usually turns out that it is not the municipality that needs the improvement but it is somebody else's road and you can't get it done. He said he only has to look at Main Street north of here to know that kind of a problem and the problem the Town faces there. It is a similar one on Western Highway. He said the site that we are contemplating developing and that we seek a special permit for will not by its nature contribute to pollution because it is not taking putrescibles. It will be taking cans which may have some soda in it. It will be taking cardboard which someone may have had a pizza in an office but we are not in the business of bringing household or industrial garbage to this site. That is not permitted under your zoning law and it is not our method of operation. We are strictly recyclables. He said he believes that we do conform to the zoning law in all respects but he said he would be pleased to help the board in any respect that they wish in terms of specific information or studies that it may need in order to assist it in its decision.

Councilwoman Smith said under your current DEC permit that is only valid under their regulations, not ours. She asked Mr. Resnick what the conditions are that they set for recycling? Mr. Resnick gave her a copy of the DEC permit. The conditions and requirements are all attached and submitted as part of the record. He said he thought it had been submitted as part of the application but he said he may be in error.

Councilman Carey asked Mr. Resnick the date on the permit. Councilwoman Smith read that it is dated July of 1987 and is valid through 1992 and because its already

been granted they are not subject to the December 31, 1988 regulations. It says they have the right to store recyclable materials for no longer than six months. Non-recyclable materials shall be stored at the site for no longer than twenty-four hours.

A gentleman from the audience stated then he has permission to hold garbage in there for twenty-four hours. Is that correct? Mr. Resnick said what it means is that during the course of recycling material which is not recyclable is included in the load we have to get rid of it within twenty-four hours. The facility has been available for inspection by the Town since the date of the permit. This is not unknown. What goes in and what comes out has not gone unobserved. There is no transfer station being operated there and that is the fact of the matter. One is not suggested nor is one desired. It is the wrong site for a transfer station. It is too small.

Supervisor said the Board will notify the public of any discussions they would have at subsequent workshops concerning this so that everybody will know when it will be coming up. Also we will notify people of when the Town intends to make its decision in regard to to this. He requested that anyone desiring any further information call his office.

Councilwoman Smith said she wanted the public to understand that this is not a transfer station. We have no intention of it ever being a transfer station. * * *

But, your Town has to realize that it is your recylables that are coming to that station also. You have to do something about the traffic from the Orangetown side no matter what is there—whether it is a recycling station or continuing what the operation is. You are asking us to work cooperatively with the County. We would like very much to do that. We also want Orangetown to work cooperatively with Clarkstown. It is not just enough to complain about the traffic on Western Highway if you are the ones who are partially responsible for it.

On motion of Councilman Carey, seconded by Councilman Maloney and unanimously adopted, the Public Hearing was closed, DECISION RESERVED, time: 11:30 P.M.

Respectfully submitted,

/s/ Patricia Sheridan
PATRICIA SHERIDAN
Town Clerk

Exhibit F to Affidavits Submitted in Support of Plaintiffs Application—Permit No. 4429 [160-162]

July 31, 1992

[Illegible]

☐ Construction
☒ Operation
☒ Initial Issue
☐ Renewal
☐ Reissuance
☐ Modification

Permit Issued to C&A Carbone, Inc.

Address of Permittee 183 Western Highway, West Nyack, NY 10994

Telephone No. (914) 358-8151

Location of Project Town of Clarkstown

County Rockland

Environmental Conservation Regional Office New Paltz

Description of Project Operate a Solid Waste Transfer Station

On-Site Supervisor Angelo Carbone

GENERAL CONDITIONS

1. The permittee shall file in the office of the Environtal Conservation Region specified above, a notice on intention to commence work at least 48 hours in advance of the time of commencement and shall also notify said office promptly in writing of the completion of the work.
2. The permitted work shall be subject to inspection by an authorized representative of the Department of En-

vironmental Conservation who may order the work suspended if the public interest so requires. .

3. As a condition of the issuance of this permit, the applicant has accepted expressly, by the execution of the application, the full legal responsibility for all damages, direct or indirect, of whatever nature, and by damages suffered, arising out of the project described herein [illegible] to indemnify and save harmless the State from suits, actions, [illegible] and costs of every name and description resulting from the said project.
4. All work carried out under this permit shall conform to the approved plans and specification. Any amendments must be approved by the Department of Environmental Conservation prior to their implementation.
5. The permittee is responsible for obtaining any other permits, approvals, easements and rights-of-way which may be required for this project.
6. By acceptance of this permit, the permittee agrees that the permit is contingent upon strict compliance with Part 360 and the special conditions. Any variances granted by the Department of Environmental Conservation to Part 360 must be in writing and attached hereto.

Issue Date 7/17/87

Issuing Officer Alexander F. Ciesluk, Jr.

Signature /s/ Alexander J. Ciesluk, Jr.

SPECIAL CONDITIONS

Waste Description:

1. This facility shall *not accept* the following wastes: liquid, chemical, explosive, industrial, hospital, (infectious and pathological) sewage sludge, septage, or any hazardous or toxic wastes as defined in 6NYCRR, Part 371.

2. Vectors, dust and odors shall be controlled by effective means so that they shall not constitute nuisances or hazards to health, safety, property or the environment.
3. Safety hazards to all persons at the facility shall be minimized at all times.
4. Blowing papers and litter shall be confined to the dumping and compacting area within the facility.
5. At the end of each day of operations all debris shall be removed from the ground and stored in an appropriate container.
6. Non-recyclable waste shall be stored at the site for no longer than 24 hours. Overnight storage shall be in closed containers.
7. Recylable materials shall be stored no longer than six months.
8. Access to and use of the facility shall be controlled by fencing, gates and warning signs. Facility hours of operation must be posted at the entrance to the site. Other means of access control may be acceptable if approval in writing is granted by this Department.
9. Access and operation of the facility shall only be permitted when adequate personnel is on duty.
10. Equipment sufficient to properly operate the facility shall be maintained on-site and in operational condition at all times.
11. Any liquid waste generated from compaction shall be collected and disposed of in a manner approved by the department. All records quantifying the col-

lection and disposal of these liquid wastes along with the identification of the waste transporter haulers involved in the disposal of these wastes shall be kept and summarized in the annual report.

12. A record of the total quantity of waste processed at the facility shall be kept on a daily basis and shall be maintained for inspection by the Department or its authorized agents.

13. An annual report shall be submitted to the Department by *June 30th* of each year. This must include: the quantity of waste processed during the year, identification of the municipalities serviced, a brief description of any problems encountered, and a detailed record of any modifications made during the year in the construction or operation of the facility.

14. All emergency situations such as fire, deposition of unauthorized waste, leachate spills or a prolonged halt to operation of the transfer station shall immeditely be reported to the Department's Regional Solid Waste Engineer in New Paltz (914) 255-5453.

15. In the event that any hazardous or unauthorized waste is found at the facility, the permittee is responsible for having such prohibited wastes removed within 24 hours to an appropriate disposal facility by a waste transporter authorized under 6NYCRR Part 364 to transport such waste.

16. This facility shall be operated in accordance with the plans and reports filed by the permittee and all applicable sections of 6NYCRR Part 360. Operating hours for this facility shall be 6:00 A.M. to 6:00 P.M. Monday through Saturday.

DISTRIBUTION:

R. Gardineer/N. Patel
Rockland County Health Department

Exhibit G to Affidavits Submitted in Support of Plaintiff's Application—Correspondence, Dated April 2, 1991 [163-164]

April 15, 1991

New York State Department of Environmental Conservation
Region 3
21 South Putt Corners Road
New Paltz, NY 12561-1696
914-255-5453

Thomas C. Jorling
Commissioner

Mr. Angelo Carbone
C&A Carbone Inc.
183 Western Highway
West Nyack, New York 10994

Re: Permit No. 4429
Transfer Station
Clarkstown, Rockland County

Dear Mr. Carbone:

There appears to be concern in regard to the type of solid waste and kinds of operations allowed at the subject facility. This letter is to clearly define the approved wastes and operations allowed under the permit to operate the transfer station, dated July 17, 1987 and to state the ramifications of the Solid Waste Management Act on the continued operation of this site.

First, in regard to the approved Solid Wastes, Special Condition No. 1 clearly delineates the wastes not allowed. This basically lists wastes that would not be allowed at landfills or require a Part 364 Industrial Waste Hauler Permits. Commercial waste and mixed municipal wastes (from households) are allowed. Construction and demolition debris is not prohibited, because at the time of issuance of the permit, that particular waste stream was

usually being disposed at the Clarkstown Landfill. Therefore, this waste can be accepted at your facility for transfer. In regard to the acceptance of recyclables, the approved engineering plan did address the acceptance of recyclables for storage and transfer. It must also be noted that baled garbage bound for incineration is not considered to be a recyclable material; it is a waste material and cannot be stored on the site for longer than 24 hours, as stated in Special Condition No. 6.

Second, in regard to the allowed activities, this facility is only approved for the transfer of solid wastes as described in the preceding paragraph and for certain recycling activities. The engineering report lists receipt, separation, storage and transfer. However, the approved engineering report does not propose any specific processing activities or equipment for the processing of construction and demolition debris. Therefore, the placement of any equipment or undertaking of processes not addressed in the engineering report would be in violation of Special Condition No. 16. This addresses the handling of all incoming wastes and recyclables.

Third, any change in the operation, as described in the engineering report and application, including an increase in waste volume, new equipment, or change in any process, requires a modification to the Part 360 Permit. Section 360-1.8(e) lists the criteria that would require a permit to construct a solid waste management facility, which is equivalent to a new application. If you wish to discuss any such modification, Region 3 staff will gladly meet with you.

Fourth, the Solid Waste Management Act (SWMA) encourages Regional solutions to solid waste problems. In Rockland County, the county is serving as the planning unit and is actively engaged in the planning process. In preparing the Solid Waste Management Plan (SWMP), under the SWMA, the county is required to address the effect of the SWMP on existing private recycling facilities.

The DEC does not feel that your facility has any entitlement for such consideration, unless the county chooses to do so. By copy of this letter, the county is being notified of this interpretation. In addition, since this facility serves primarily Rockland County, the permit renewal of this facility will be based on the results and the recommendation of the county's SWMP.

In closing, it is trusted that this has better defined the existing permit for your facility. If you have any questions, please contact either myself or Al Ciesluk of my staff at this office.

Respectfully,

/s/ Margaret Duke
MARGARET DUKE
Regional Permit Administrator
Region 3.

cc: R. Manna
M. Cech
L. Bollman
RCHD
N. Nosenchuck
A. Klauss/A. Shah
ECO M. Mazurkiewicz

Exhibit H to Affidavits Submitted in Support of Plaintiff's Application—Correspondence, Dated April 5, 1991 [165-168]

New York State Department of Environmental Conservation
202 Mamaroneck Avenue
White Plains, N.Y. 10601-5381
(914) 761-6660

Thomas C. Jorling
Commissioner

April 2, 1991

MICHAEL A. CECH
DIRECTOR, SOLID WASTE MANAGEMENT
COUNTY OF ROCKLAND
ALLISON-PARRIS COUNTY OFFICE BLDG.
NEW CITY, NY 10956

Dear Mr. Cech:

This is in response to your letter of March 19, 1991 in which you posed several questions concerning the C&A Carbone and Clarkstown Recycling transfer stations in Rockland County. Before addressing your specific questions, the following should be first understood.

The Permit to Operate for the Carbone facility was issued in July of 1987; the facility was subject to the May 1981 Part 360 regulations which were in effect at that time. The Permit to Operate for the Clarkstown Recycling Center, Inc. (CRCI) was issued in December 1990; this facility was permitted in accordance with the December 1988 Part 360 regulations. In addition, the Carbone permit was issued prior to the enactment of the Solid Waste Management Act of 1988 and the CRCI permit was issued after enactment of the aforementioned Act. This is significant because the requirements for each of the two facilities are somewhat different as explained in this letter.

The questions you have raised are listed below, followed by our response.

Question: What portion of the DEC permit allows Carbone to "accept and sort" recyclables?

Response: Special Condition No. 16 of the Permit to Operate for the Carbone facility states "This facility shall be operated in accordance with the plans and reports filed by the permittee and all applicable sections of 6NYCRR Part 360." The project description provided in the permit application and the engineer's report refers to receipt, separation, storage and transfer of recyclables. In addition, Special Condition No. 7 of the permit states "Recylable materials shall be stored no longer than six months." From this, it can be construed that Carbone's permit allows them to manage recylables. However, no specialized equipment for recylables (with the exception of a paper baler) was listed in the plan drawing and engineer's report for this facility. Therefore, recycling activities at this facility are somewhat limited. In accordance with Section 360.1.8(e)(3), DEC approval is required prior to installation of any additional equipment. The language in the permit appears to be imprecise concerning recyclables by current standards since the permit was issued in 1987 based on 1981 regulations. These conditions will be clarified when the permit comes up for renewal in 1992. It should be further noted that we consider this facility to be primarily a transfer station and not a Materials Recovery Facility (MRF). It has come to our attention that the facility may have transported baled garbage destined for a waste-to-energy facility using a "manifest" which describes the waste as "recylables." This approach is contrary to the Department's rules and regulations.

Question: The Clarkstown Recycling Center, Inc. has specific authority to handle C&D debris, whereas the Carbone permit does not contain similar language. Why

was it not necessary to exclude C&D debris in the Carbone permit?

Response: At the time the Carbone permit was issued, the Town of Clarkstown landfill was operational. It is our understanding that majority of C&D debris from Clarkstown and Orangetown was disposed of at the Town landfill in a separate area designated for C&D debris. Due to this, it was not critical to address C&D debris specifically in the Carbone permit. A review of the permit, the permit application and engineer's report indicates that the Carbone facility is *not prohibited from transferring* C&D debris; however, it is *not permitted to process* C&D debris since processing was not listed in the application. If the Carbone facility's operator wishes to process C&D debris, a permit modification would be required. As stated in our response to your first question, the language in the Carbone permit concerning C&D debris appears to be imprecise by current standards due to the different regulations in effect at the time the permit was issued.

Question: Does Condition #5 in the Clarkstown Recycling, Inc. (CRCI) permit require a County-wide Plan? Since Condition #5 appears to require a County-wide Plan, why are there two options under Condition #26?

Response: The definition of a Planning Unit in Section 360-15.2 states, in part, "Planning unit means a county . . . ; or two or more cities, towns, or villages, . . . , that the department determines to be capable of implementing a regional solid waste management program. . . ." Based on this definition, it is our understanding that the County of Rockland is the planning unit in Rockland County. Consequently, Special Condition #5 requires a County-wide Plan.

Condition #26, which is a generic condition for most solid waste management facilities, is based on the requirement in Section 360-1.11(h)(2). As stated in your letter, this section presents two options as it relates to a Comprehensive Recycling Analysis (CRA). It is our opinion that if a County-wide Plan does not go into effect, the requirement to have a municipal CRA would still apply. If a County-wide Plan goes into effect by the dates indicated, the municipal CRA option would become moot.

Question: What recycling equipment is authorized in the CRCI permit? Where does the permit allow for processing or handling of recyclables?

Response: In general, construction of a solid waste management facility must be in accordance with the drawings approved by the Department. The plan drawings for the Clarkstown transfer station show i) a baler for solid waste, ii) a storage area for recyclables within the building, and iii) a recycling area outside the building, consisting of a ramp and containers. *No other recycling equipment is authorized in the permit.* CRCI may be able to use the existing baler for baling plastics, paper or cardboard; however, no additional equipment can be installed without the Department's approval. This approval will require a construction permit modification under Section 360-1.8(e).

Special Condition #4 states that the permittee is authorized to accept and sort recyclables for transfer to other facilities for recycling and reuse. This would allow the facility to handle recyclables. Since the permit does not allow installation of any specialized recycling equipment, the sorting and/or processing would most likely be limited in nature.

The Department considers the CRCI facility to be primarily a transfer station and not a materials recovery facility.

Question: Under what conditions will the permittee (CRCI) be operating after February 15, 1991 date which is referenced in Special Condition #2.

Response: After February 15, 1991, permittee is subject to all conditions in the permit; operation must be in accordance with the approved drawings and reports and all applicable provisions of Part 360.

In closing, the concerns raised in your March 19 letter and previous letters are such that the Region will contact these two facilities in writing and delineate which specific waste may be handled and which specific activities they are entitled under their existing permits. In addition, these notifications will also delineate the activities they are not presently entitled and for which they must submit modification applications if they wish to undertake such activities. Both facilities will be advised that any future activities must be consistent with the Rockland County Solid Waste Managament Plan. You will receive copies of these letters and any future correspondence with these facilities. It is the goal of this Department to insure that the County is not hindered in any way from implementing a comprehensive solid waste management plan.

Please contact me if you have any further questions or concerns.

Very truly yours,

/s/ Ajay R. Shah
AJAY R. SHAH, P.E.
Environmental Engineer 2
Division of Solid Waste
Region 3

cc: Hon. John T. Grant; County Executive
Hon. Herbert Reisman, Chairman, Solid Waste Committee
Hon. Charles Holbrook; Supervisor, Town of Clarkstown
Joseph Puchalik, P.E.; County Health Department
Ralph Manna
Al Klauss/Rich Gardineer
Margaret Duke

Exhibit M to Affidavits Submitted in Support of Plaintiff's Application—Environmental Assessment Form [240-245]

TOWN OF CLARKSTOWN
ROCKLAND COUNTY, NEW YORK

PROPOSED SOLID WASTE TRANSFER STATION

STATE ENVIRONMENTAL QUALITY REVIEW
(SEQR)
FULL ENVIRONMENTAL ASSESSMENT FORM
(EAF)

PART 3

The Town of Clarkstown is presently negotiating with the State Department of Environmental Conservation (DEC) the terms of a Consent Order which will set a date for the closing of the existing Town sanitary landfill and require a Remedial Investigation and Feasibility Study (RI/FS) to be performed at the landfill site.

The necessity to close the existing landfill requires that immediate steps be taken to provide an alternative means for disposal of the municipal and commercial solid waste originating in the Town of Clarkstown. At present, there is no approved site for the location of another solid waste landfill in the Town of Clarkstown. Rockland County is now developing a Solid Waste Management Plan which will establish the methods by which waste reduction, recycling, and solid waste disposal will be accomplished throughout the County. It is anticipated that the development and implementation of this plan will take at least 5 to 8 years to complete.

In order to provide for disposal of solid waste after the closing of the existing landfill, the Town of Clarkstown is proposing to construct a solid waste transfer station on the existing landfill site. The transfer facility

would be located approximately 250 feet north-west of the existing [illegible] and garage and 230 feet back from N.Y.S. Route [illegible] the landfill where only construction debris has been deposited. The total project area is 7.0 acres and includes the existing office and garage building, the storage building and the landfill scale. Frontage along Route 303 is about 700 feet. The entire transfer station facility will be constructed within the leachate collection system which surrounds the present landfill. A project location map and a topographic map of the landfill showing the location of the proposed transfer station is included with this submission.

The proposed capacity of the transfer station has been estimated at 500 tons per day. This figure was developed from landfill scale records and includes solid waste received from both the towns of Clarkstown and Orangetown. The Town of Orangetown has been a contract user of the landfill for over 20 years and is facing a situation similar to Clarkstown with the landfill closing. Capacity for their use is being provided so that they can utilize the facility for their immediate needs as well as allowing for use of the transfer station in the future as part of the Rockland County disposal plan.

In the selection study for the proposed site, other parcels in the Town which were located in manufacturing or laboratory/office zoned areas were also reviewed. The availability and size of parcels of land in areas with this zoning was limited. Existing adjacent residential or regional shopping development, local traffic restrictions, necessary topographic considerations and the adaptability of the proposed transfer station to the local land use plans eliminated other parcels from realistic consideration.

The advantages of the existing landfill site over any other parcel includes:

(a) the continued use of a site already established as a solid waste handling area,

(b) the existence of an office and garage building and 60-ton scale at the site located within the proposed project parcel area of 7 acres,

(c) maintenance of existing traffic patterns for delivery of solid waste to the transfer station from both the towns of Clarkstown and Orangetown,

(d) major State roads and highway routes directly to and from the site,

(e) site topography which allows for the differential elevations necessary to provide a transfer facility with limited "cut and fill" requirements, and

(f) location of the parcel within a total area of over 100 acres in size which is owned by the Town of Clarkstown.

The following evaluations are provided for the impacts which must be considered as a result of the location of the transfer station at the proposed site.

Impact on Land

The landfill site on which the parcel for the transfer station is located has been identified as a Class 2 site. This classification indicates that there may have been deposits of some hazarous or toxic wastes at the site. The DEC is requiring an RI/FS to be made to identify any of these wastes which may be present and to take necessary remedial action to alleviate this condition.

The parcel on which the transfer station will be located is in the front portion of the site along Rt. 303. Deposits in this portion of the fill area have been only construction and demolition debris as well as an earth berm to act as a screen for the middle and rear operat-

ing sections of the landfill. Geotechnical and hydrogeologic investigations made in 1936 as part of the existing consent order requirements show that approximately 10 feet of highly impermiable peat exist immediately below the construction debris and that a gray varved clay layer, also some 10 feet thick, exists below the peat in this project area. This material has a vertical permeability of less than $1x10^{-7}$ cm/sec. Higher horizontal permeability values can be expected.

A leachate collection system consisting of a vertical liner from an elevation above the ground water level down into the peat layer and approximately 9,000 lineal feet of collection pipe tributary to 7 Collection Chambers surround the existing landfill. Leachate from this system is pumped to 2 Holding Basins. A pump station is presently being completed at the site which will draw leachate from these Holding Basins and pump it to the Rockland County Sewage Treatment Plant. Extensive tests made on samples taken from the leachate system indicate that the treatment plant can treat this flow without any pretreatment. Monthly tests on the leachate will be made to insure that the liquid being sent to the plant is acceptable. Present quarterly tests which are being made by the Town continue to show that the leachate draw from the landfill can be treated at the plant with no adverse effects on the treatment system. The proposed transfer station is within this leachate collection system.

It is expected that a pile foundation will be required to support the transfer station, however, it is not anticipated that this will have any effect on the subsurface drainage structure which contains the leachate described above.

Noise and Odor Impacts

The solid waste delivered to the transfer station will all be handled inside of the proposed structure and de-

livery of material to the facility will not be accepted after 3:00 p.m. No solid waste will be stored at the site. Some material which has been placed in a covered transfer vehicle may be kept on the tipping floor over-night for early delivery to the disposed point the next day. Some odors may be persent during the day, however, high ventilation exhausts from the building will keep the odors to a minimum. The location of the structure some 230 feet back from Route 303 will also reduce the probability of any odors to the surrounding area.

Noise levels within the facility during the day will not be above that which presently exists in the area.

Impact on Public Health

Some excavation in the construction debris section of the existing landfill will occur during construction of the transfer station. Since the transfer station will become active after the closing of the landfill no disturbance of material adjacent to the facility is anticipated.

Exhibit O to Affidavits Submitted in Support of Plaintiff's Application—Velzy Associates' "Plan and Report" [249-280]

TOWN OF CLARKSTOWN
ROCKLAND COUNTY, NEW YORK

MAP, PLAN AND REPORT
FOR THE ESTABLISHMENT OF
TOWN GARBAGE AND REFUSE DISTRICT

SEPTEMBER 1987

VELZY ASSOCIATES

Charles R. Velzy Associates, Inc.
Consulting Engineers
Amonk, New York
Buffalo, New York
Cape Place Long Island,
New York
York, Pennsylvania

TABLE OF CONTENTS

	Page
GENERAL	[88]
SCOPE OF PROJECT	[90]
COLLECTION OF MUNICIPAL SOLID WASTE	[91]
COLLECTION OF BULK, WHITE GOODS, ETC.	[93]
RECYCLING PROGRAM	[94]
LEAF PICKUP AND COMPOSTING	[102]
FINANCING	[104]
TYPICAL COSTS	[109]

TOWN OF CLARKSTOWN
ROCKLAND COUNTY, NEW YORK

MAP, PLAN AND REPORT FOR THE ESTABLISHMENT OF TOWN GARBAGE AND REFUSE DISTRICT

GENERAL

The Town of Clarkstown has been providing for the disposal of municipal solid waste at the Town Sanitary Landfill south of Route 59 and west of Route 303 in West Nyack for well over 35 years. During this period the Town of Orangetown, under the conditions and requirements contained in agreements negotiated between the two Towns, has also been utilizing the landfill for disposal of residential and commercial solid waste. In recent months, the Town of Ramapo, because of conditions which have eliminated their ability to transfer solid waste to a balefill in Pennsylvania, has also been allowed to dispose of their solid waste at the Clarkstown Landfill. The average daily quantity of solid waste delivered to the Clarkstown Landfill from the three Towns, including all Villages within their boundaries, is approximately 750 to 800 tons.

At present, the Town sanitary landfill is being operated under the provisions given in State regulations governing the operation of landfills and a "Consent Order" issued by the State Department of Environmental Conservation (DEC), the Agency assigned the responsibility to regulate and control the operation of solid waste disposal facilities in the State.

The DEC, under the provisions included in the Consent Order, has the power to immediately close the existing landfill if certain operating conditions and restrictions are not met. It is urgent, therefore, to develop a long term answer to both the Town and County's solid waste disposal problem by developing a regional resource re-

covery facility or a new landfill which meets present DEC requirements. In the interim period, the existing landfill must be operated in a manner which will both protect the environment and save as much capacity as possible so that its useful life may be extended.

In order to more effectively control the quantity of solid waste being delivered to the landfill so that the valuable remaining capacity can be extended over a longer period, the Town of Clarkstown is proposing the creation of a Town Garbage and Refuse District pursuant to Article 12-A of the Town Law.

The formation of this District will allow the Town to institute a program for the collection of municipal solid waste, trash and construction materials; establish a recycling plan which will reduce the quantity of mateiral dumped at the landfill while returning used material back into the economy so that natural resources may be conserved; and, provide for the pickup and composting of leaves which have been previously placed in the landfill.

In order to obtain total compliance with this concept, it will be requested that the Towns of Orangetown and Ramapo, as well as the Villages within these Towns whose garbage forms a part of the total waste stream, also establish Garbage and Refuse Districts, or other regulating controls, so that the same approach to the management of solid waste is obtained by all those municipalities utilizing the Landfill.

The proposed District discussed in this Report will include the entire unincorporated area of the Town of Clarkstown, the Village of Upper Nyack and those portions of the Villages of Spring Valley and Nyack, located within the boundaries of the Town. In order for the Villages to be part of the Garbage and Refuse District, it will be necessary for each Village to pass a local law or resolution subject to a permissive referendum authorizing the Village to join such a District.

In order to create the District, it is necessary for the Town Board to direct preparation of a map delineating the boundaries of the proposed District, a Plan and Report. This Report will indicate the reasons the Garbage and Refuse District is being formed, how the District will operate and how it will be financed.

A map, showing the area included in the proposed Town Garbage and Refuse District, is included in this Report.

SCOPE OF PROJECT

This disposal operation which includes the placement of solid waste and daily cover material, leachate collection and disposal, closing of a portion of the south section of the existing landfill, drainage control, methane containment and monitoring requirements, will remain the responsibility of the Town Department of Environmental Control and the costs for this disposal phase of the solid waste program will continue to be included in the Town budget.

The portion of the solid waste management program which will be administered by the Garbage and Refuse District will be:

1. Collection of Municipal Solid Waste
2. Collection of Bulk, White Goods, etc.
3. Material Recycling Program
4. Leaf Pickup and Composting.

These four parts of the collection and recycling program will be reviewed in order to establish the most cost effective method and will be discussed individually in the following Report. Proposed regulations, required capital expenditures, operation and maintenance costs, estimated incomes, financing procedures and estimated costs to property owners are included in the Report.

COLLECTION OF MUNICIPAL SOLID WASTE

Collection of solid waste, both residential and commercial, will continue to be accomplished by private carters. Permits and licensing of these carters will remain the responsibility of the Town Sanitation Commission.

Carters will maintain their own routes and customers. Service will still be required twice a week at the rear door, with a maximum of four cans within specified weight limits per pickup.

Fees for residential garbage collection will continue to be established by the Town Sanitation Commission after review with the carters.

Commercial, industrial, condominium, town houses and apartments will also be served by private carters, however, there would be no set rates established by the commission for this service.

It is intended that in the first phase the residential waste picked up by the carters will no longer include newspaper, clear (flint) glass and cans. Source separation of this type of solid waste will be required by all residential homeowners. In the second phase, commercial, condominium, apartment, etc., owners will be required to take part in this recycling program although their inclusion is not mandatory at this time. The second phase of the project shall be instituted within one year.

Fees for residential garbage collection, including the cost for "tipping" at the landfill, will either continue to be collected by the carters individually or by the Town as part of the Town tax bill received in January.

If the Town elects to collect these fees, carters will be required to supply the name and address of all residential customers to the Town. This data will be maintained in a computer program. Monthly payments will be made to the carters for the service provided to their customers. Records of payment will be kept by the Town utilizing

the computer system, thus minimizing the work effort. This system will also provide scheduled monthly full payment to the carter, giving their business better cash flow.

If the carters bill individually, they will be responsible to pay the monthly bill for the tonnage dumped at the landfill. If the collection fees are collected by the Town, then deductions for the tipping charges accrued by the carter during the month will be made from the collection payments due them so that double handling of this fee will not occur.

Investment of any garbage collection fees collected by the District will provide added income which could be used to offset a portion of the district costs.

No capital costs for this division of the solid waste program will be required, however, as stated above, annual operation and maintenance expenses at the landfill, as well as capital expenditures for closing costs, will still be paid for by the Town and included as part of the Town Budget.

It is anticipated that the tipping fee at the landfill will be increased. This will affect the monthly payments made to the carters or the pay back given to the Town for tipping.

Using present numbers as an example, if the existing tipping fee of $6 per ton was doubled, the annual increase to a single family residential unit with four inhabitants, each person (allowing for a reduction in weight for those items which will be recycled) contributing an average of 0.75 tons per year of garbage, would be $18. This would equal $1.50 per month and increase the present monthly collection fee in the unincorporated areas of the Town to about $13.50.

The collection system charges to the Villages of Upper Nyack, Nyack and Spring Valley could be arranged individually depending upon whether collection is done with municipal collectors or through a contract with a single carter.

COLLECTION OF BULK, WHITE GOODS, ETC.

The Town Highway Department currently has the responsibility for collecting bulk throughout the Town on a scheduled basis once a year. This bulk pickup responsibility becomes an expensive item in the Town Highway Department Budget and interferes with the completion of other important items of work.

It is proposed that the new regulations require the carters to pickup bulk items at least one a month, with the possible exception of the winter months of December, January and February, at the curb as a part of their service. The Sanitation Commission would approve the additional costs to be paid for this service. This fee would be collected by the Town as part of the Garbage and Refuse District charges collected annually with the Town tax. Bulk pickup would not include large stumps or construction and demolition debris. This should be the homeowner's or contractor's responsibility. The carter should separate white goods such as hot water heaters, refrigerators, etc., from the bulk pickup so that it can be dumped at special places either at the landfill or the recycling center. Bulk would include spring and fall clean-up items, such as brush and tree limbs, provided they are cut and bundled in sizes required by landfill regulations.

Tires can be collected with the bulk materials, however, a separate additional charge will be collected for them at the landfill which the carter will be required to pay, but will be reimbursed by the District.

The monthly day of bulk pickup will be scheduled for each area by the carters. No bulk material should be allowed to be placed at the curb more than two days prior to its scheduled collection.

It is anticipated that the carters may be able to handle some of the smaller items with their regular garbage collection vehicle, however, a separate run for bulk items and white goods with another truck may be more feasible. This will be reviewed by the Sanitation Commission when establishing the bulk collection rates. In discussions with the carters, it has been indicated that a figure of between $2 and $4 per month per unit can be anticipated for this bulk collection service.

RECYCLING PROGRAM

In determining that a recycling program should be a major part of the solid waste management program for the Town of Clarkstown, an extensive amount of analysis and review went into the decision. The prime mover is the fact that limited landfill capacity is available to meet the long term needs of the Town as well as those of other communities who are also using the facility. A reduction in the quantity of solid waste going into the landfill is therefore a necessity. Figures of reductions ranging from 10% to 30% of present volume have been estimated. Estimates of goals as high as 50% have been made by the DEC who has recently established requirements that recycling be actively considered prior to the issuance of a Part 360 Permit for operation of a solid waste disposal facility.

Visits were made by Town officials to Camden, New Jersey and Toronto, Canada to see first-hand how recycling systems there are being run and to evaluate their possible use in Clarkstown. Attendance at several seminars and solid waste association meetings in New York and New England provided additional data on which to base a decision on which way the Clarkstown program should be directed.

In addition, discussions were held between the Town and the Carter's Association to establish the most effective methods of collection and allocation of costs.

One important fact which should be emphasized is that recycling is not a money making solution. The costs to collect, handle and transport recyclable goods will almost always outweigh the selling price received for these materials.

What can be accomplished, however, is a possible significant reduction in the total cost of handling solid waste, the benefits derived from returning reusable material to the market and the saving in landfill space previously required to contain these items.

The recycling plan selected for use in Clarkstown is one in which plastic recycling boxes are purchased by the Town and given to all single, two and three-family houses. In the Town of Clarkstown, this totals approximately 19,200 units. Each family is responsible for separating recyclable materials from their own waste stream. Recyclable items in the initial phase of this program will be newspapers (tied in a bundle or put in a paper shopping bag), clear or flint glass bottles and cans. These items will be put in the plastic recycling box which will be placed at the curb once a week on the garbage collection day which has also been designated as the recycling pickup day for your area.

The contents of these boxes will be emptied into a recycling pickup truck which serves your area. Newspapers, glass and cans will be put into separate sections in the truck so that separation is made at the source. The box is left behind for continued use on recycling days. It is estimated that perhaps 700 units can be served by a recycling truck per work day and that seven trucks, including one standby vehicle, would be required to serve the Town on a five day work week.

A recycling center to receive the recyclable material would be constructed on the Town owned field adjacent to the south side of the landfill along Route 303. All trucks delivering recyclable items would be weighed on the

existing landfill scale before going to the recycling center so that a weight total could be kept of the material diverted from the landfill.

The building at the recycling center would be of the Armco steel shell type. It would have sufficient room to dump and store the material delivered during a day. It would also be equipped with a baler for compacting paper and cans into bales which could more easily and efficiently be transported to customers buying the material. A small office and toilet facility would also be provided.

A payloader and small dozer would be required to handle material at the recycling center. Several small bins as well as large roll-off containers in which materials could be stored and shipped would also be needed as well as a truck for hauling the material to customers.

The following are estimated capital and annual operation and maintenance costs for the proposed recycling center and the recycling collection system trucks and boxes, to indicate the amount of funding necessary for this phase of the project.

RECYCLING CENTER AT LANDFILL

Estimated Capital Costs:

Site Work—Entrance road off Rte. 303, Road & Bridge from Landfill to Recycling Center, Grading, misc.	$30,000
Foundation Piles	62,000
Concrete Foundation	250,000
Interior Separation Walls	25,000
Metal Building w/Insulation	145,000
Office & Toilet Area	8,000
Heating, Ventilation & Electrical	40,000
Baler	200,000
Subtotal	$730,000
1 Payloader	70,000
1 Yard Donkey	40,000
4 Bins (@ 2,000 ea.)	8,000
3 Trailers (@ 40,000 each.)	120,000
2 Tractors (@ $70,000 ea.)	140,000
Subtotal	$378,000
Total	$1,108,000
Contingencies (10% ±)	112,000
	$1,220,000
Administrative, Legal & Engineering Fees (15% ±)	180,000
Total	$1,400,000

Estimated Operation & Maintenance

Employees (Salary including benefits)	
Equipment Operator/Supervisor	$45,000
2-Laborers	70,000
1-Truck Driver	40,000
1-Secretary	25,000
Subtotal	$180,000
Utilities (Elec., Heating, Ventilation, etc.)	20,000
Maintenance	15,000
Payloader & Yard Donkey Operation (Fuel, Oil, Tires, Maintenance, etc.)	10,000
Haul Costs (Fuel, Tires, Oil, Lubrication, Maintenance, Insurance, etc.)	20,000
Subtotal	65,000
TOTAL	$245,000/yr.

Note: Annual O&M charges will increase each year due to employee raises and increasing maintenance and hauling costs. An average rate of 5% may be assumed.

RECYCLING COLLECTION SYSTEM

Estimated Capital Costs

Recycling Boxes-22,000 Boxes @$4.50 per Box	$100,000
Collection Trucks-7 trucks @$50,000 per truck	350,000
Pickup Truck	25,000
Total	$475,000
Administration, Legal & Engineering (10% ±)	45,000
Total	$520,000

Estimated Operation & Maintenance

6 Trucks operating per day (Estimate 70 mi/day/truck)	
Driver (Salary + Benefits, etc.)	$35,000
Gasoline	4,500
Tires	1,200
Insurance	2,500
Oil, Lub, etc.	500
Maintenance & Miscellaneous	4,300
Administration and Overhead	8,000
Profit	4,000
Subtotal	$60,000/Truck/yr.
6 Trucks @$60,000 ±	$360,000
Support Operation	20,000
TOTAL	$380,000

It is anticipated that collection of the recyclable items will be accomplished by the licensed carters, either in individually organized groups or through the Carter's Association.

Collection routes will be established throughout the Town, to insure that all properties are served. Recycling boxes will be given to each residential unit.

The collectors will buy or lease the recycling collection trucks from the Town, who will purchase the trucks. Payment to the Town for these vehicles will be made either by the recycling collectors or the Association or be deducted from the recycling collection fees received by the Town in the yearly Town Garbage and Refuse District tax bill.

Maintenance, repair and operation expenses for these trucks will be that of the collectors.

The collection charge for a single family residential unit, using the estimated annual operation and maintenance costs and repayment figures for the truck developed in this report, is estimated between $2 and $3 per month.

Charges for the capital cost of the recycling center, together with its operation and maintenance expenses, will be billed to all properties in the Town on an ad valorem basis. Estimated tax rates for this portion of the project will be presented in the financing section of this report.

The following is an estimate of the income which may be anticipated at the recycling center from material collected in Clarkstown from residential units. The estimated prices per ton used for the various materials are based on those obtained from firms who purchase these recyclable items. It should be anticipated that these unit prices will vary over periods of time, however, they represent an average of the current prices and may be used to establish an approximate yearly income.

Income

Newspaper

Assuming 19,000 units, 75% participation and an average of 7 lbs. of newspaper per week

19,000 Units x 0.75 x 7 lbs/wk=100,000 lbs/wk

100,000 lbs/wk—5 days—2,000 lbs/ton=10 tons/day

10 tons x $15/ton avg.=$150/day

$150/day x 260 days/yr.=$39,000/yr.

This is total from 1, 2 and 3 Family Units in Clarkstown. Estimated amount from commercial, industrial, co-ops, apartments, town houses, etc.=$10,000/yr.

Newspaper Total=$49,000/yr.

Glass

Assume 5 tons/day

5 tons/day x 260 days=1,300 tons/yr.

1,300 tons/yr. x $45/ton avg.=$58,500/yr.

Ferrous

Assume 3 tons/day

3 tons/day x 260 days—780 tons/yr.

780 tons/yr. x $50/ton avg.=$39,000/yr.

White Goods

Estimate—$10,000/yr.

TOTAL ESTIMATED FIRST YEAR INCOME

Newspapers	**$49,000**
Glass	**58,500**
Aluminum	**65,000**
Ferrous	**39,000**
Misc.	**10,000**
	$221,500

In addition to this income from the sale of recyclable material, savings will also accrue to the district because the reduced tonnage being deposited in the landfill will mean lower total tipping fee costs to the residents. At the present rate of $6/ton, the approximate 20 tons/day of recyclable material would have cost an additional $120 at the landfill. This would amount to some $31,000 per year. If the new tipping fee were doubled, the amount saved would be $62,000 per year.

LEAF PICKUP AND COMPOSTING

Leaf pickup has been accomplished by the Town Highway Department over the past years. The majority of these leaves have been deposited at the Town landfill.

It is proposed that the Highway Department, possibly using additional suction equipment, will still collect the leaves, however, disposal of the leaves will now be accomplished by composting. No leaves will be accepted at the Town landfill.

The most suitable site, of those reviewed, is the one on the Town owned French Farm site. The terrain, soil condition, access roads and well wooded buffer all contribute to making this 4.0 acres ideal for composting the 16,500 cubic yards of leaves generated in the Town per year. Site clearance at French Farms will not be difficult as the old leaves at this site can be pushed to the side to form part of a protective berm. From the conservation viewpoint the area is already cleared so that no trees have to be cut. The location of the site, by virtue of not being in an environmentally sensitive area will make it easier to obtain DEC approval.

The composting system is a process based on the windrow method, that compost leaves fast but in an odorless, clean and safe manner. The major components are balanced to create a conducive macro and micro environment necessary to achieve the desired results at an economical cost.

The advantages of the system employed in this program are:

1. Odorless process
2. Clean and safe
3. Fast—composts leaves within six months
4. Composts more leaves per acre than other method. (5,000 cubic yards of compacted leaves to an acre each six month period)
5. Economical—low capital outlay and low operating cost
6. Flexible system tailored to the specific needs of the community.

An area requirement of one acre for 5,000 cubic yards of leaves (1,000 tons) is required for the actual composting operations per six month period. By planning to compost leaves collected during fall and then later in spring, the system can increase the capacity of one acre to 7,500 cubic yards or 1,500 tons of leaves. This is the case for Clarkstown where 13,000 cubic yards of leaves are expected to be collected during fall and 3,500 cubic yards during spring. The proposed site is land previously acquired for "municipal purposes". The total acreage of the site is 9.8 acres with a large cleared area in the center. This cleared area measures 4.0 acres and will be used for the actual composting operation.

At the end of composting process, the initial volume of leaves will be reduced by a ratio of 6:1, therefore, the estimated 16,500 cubic yards of leaves will produce 2,750 cubic yards of leaf humus.

The leaf humus produced is proposed to be disposed of by allowing residents to take it free for their own use, use on Town properties for landscaping and sale of any surplus.

The estimated annual cost for the composting system proposed will be $3.00 per cubic yard of leaves, which

totals $49,500 for the estimated 16,500 C.Y. volume. The operating cost has been estimated at $1.00/C.Y. or $16,500 per year.

An initial consulting fee for advice on site preparation and training of Town personnel would be $4,000.

The equipment necessary for operation of the composting facility will be a front-end loader, watering truck, a "rotavator" and a tractor (for a period of two weeks) and a sprayer with a capacity of 150 gallons mounted on a truck or tandem that can be pulled by any vehicle.

Initial site preparation, estimated at a maximum of $7,000, and the cost of the sprayer and rotavator, about $6,500, will be additional equipment expenditures required only in the first year. The required loader and water truck will be obtained from the Town Highway equipment pool when needed.

The annual costs for the operation of the composting system will be included as a general Town charge for the unincorporated area. The estimated tax rate and annual charge to an average residential unit will be presented in the financing section of this report.

An alternative to composting all of the leaves by the Town at French Farms would be to deliver a percentage of the leaves to Lederle (American Cyanamid Company) for use in their DEC approved composting operation.

FINANCING

Financing will be accomplished using the following methods for collecting service charges, operating and maintenance costs and capital costs. These are:

1. Direct billing to all residential and commercial properties by the carters for garbage collection and disposal at the landfill site.
2. Bulk and recycling collection costs will be charged to residential units and will be collected as a District charge.

3. The recycling center will be collected as a District charge from all properties within the Town on an ad valorem basis.
4. The composting charges will be collected as a general Town charge for the unincorporated areas of the Town.

Capital costs will be financed by Town general obligation bonds. The period of bond repayment will vary depending upon the type of facility or equipment purchased. For the calculations presented in this report the bond repayment period for the recycling center building, roads and site work will be 20 years, while the repayment period for all equipment will be five years.

A figure of 7 percent has been used as the interest rate for all bonds.

In establishing the bond repayment schedule, the State's "50% Rule" has been applied. This enables a division of the annual repayment of the principal amount in a manner which will allow a lower payment to be made in the initial years with higher payments due in the later years when the Town population has increased and the resulting unit costs will still be kept low.

Using the bond repayment schedules derived for the capital costs, the following charges have been calculated for various years during the bond repayment periods.

Recycling Center Building ($925,000, 20 yr. bond)

Year	Principal	Interest	Total
1	$38,000	$64,750	$102,750
5	38,000	54,110	92,110
10	50,000	40,810	90,810
20	57,000	3,990	60,990

Recycling Center Equipment ($475,000, 5 yr. bond)

Year	Principal	Interest	Total
1	$80,000	$33,250	$113,250
5	120,000	8,400	128,400

Recycling Collection Equipment ($520,000, 5 yr. bond)

Year	Principal	Interest	Total
1	$90,000	$36,400	$126,400
5	135,000	9,450	144,450

The following are the assessed valuation figures, rounded to the nearest million dollars, for the unincorporated portion of the Town of Clarkstown, the Village of Upper Nyack, and that portion of the Villages of Nyack and Spring Valley within the Town of Clarkstown. The figures are given for single, double and three family residential units and commercial, apartment, condominium, townhouses and vacant land.

Assessed Valuations

	Residential	Commercial, etc.	Total
Clarkstown	$2,549	$513	$3,062
Upper Nyack	91	8	99
Nyack	0.15	13	13
Spring Valley	10	18	28
Totals	$2,650	$552	$3,202

Note: Figures are given in million dollars.

The number of single, two and three family residential units in the Town of Clarkstown was also obtained.

Single Family	18,489
Two Family	533
Three Family	54

This totals 19,717 dwelling units.

These annual bond repayment figures, assessed valuations and number of residential units were used to determine the annual charges and tax rates for the various phases of the total solid waste management project. A summary of these charges for the first year are given below.

Garbage Collection and Tipping Fee

Between $12 and $14 per Residential Unit per Month

Final rate to be set by Sanitation Commission

Residential units billed monthly by carters.

Bulk Pickup

Between $2 and $4 per Residential Unit per Month

Final rate to be determined by Sanitation Commission

Residential units to be billed annually with Town tax bill.

Recycling Collection System

Equipment	$126,400
Operation and Maintenance	380,000
Total	$506,400

$$\frac{\$506,400}{19,717 \text{ units}} = \$25.69 \text{ per year, per unit}$$

$$= \$2.14 \text{ per month, per unit}$$

Final rate to be determined by Sanitation Commission Residential units to be billed annually as a District charge.

Recycling Center	
Building	$102,750
Equipment	113,250
Operation & Maintenance	245,000
Subtotal	$461,000
Less Estimated Income and Reductions	283,000
Total	$178,000

$178,000 = $0.056 per thousand A.V.

All properties in District to be billed annually as a District charge.

Composting	
Consultant Fee	$4,000
Site Work	7,000
Equipment	6,500
Composting System	49,500
Operating Costs	16,500
Total	$83,000

$83,000 / $3,062 million A.V. = $0.027 per thousand A.V.

All properties in unincorporated portions of Clarkstown to be billed annually with Town tax bill. Incorporated portions of Clarkstown wishing to dispose of leaves at the composting facility will be charged at a rate of $5 per cubic yard.

It should be noted that no allowance for State aid in the amount of $50,000 per community has been included in these calculations. Neither was the anticipated assistance from Rockland County to initiate this recycling project, which will serve the lower portion of the County, been included. If and when these grants become available, they can be used to significantly reduce the annual charges to the District.

TYPICAL COSTS

Using the annual rates developed for capital costs and operation and maintenance expenses, the following anticipated charges, for those phases of the project for which the Town will collect the fee for, a typical residential user can be estimated.

Single Family Residential Unit

Annual Charges

Assessed Value	Bulk	Recycling *	Compost	Total
$100,000	$36	$32	$3	$71
150,000	36	34	4	74
200,000	36	37	6	79
250,000	36	40	7	83

* These costs include ad valorem and use charges.

These figures average approximately $7 per month.

The monthly garbage collection portion of the total bill will still be collected by the carter.

Exhibit A to First Amended Answer—
Order of the Hon. Alfred J. Weiner, A.J.S.C.,
Dated October 18, 1990 [296-297]

SUPREME COURT—STATE OF NEW YORK
IAS PART: ROCKLAND COUNTY

Present: HON. ALFRED J. WEINER
Acting Justice of the Supreme Court

Index No. 5433/90

Motion Date Oct. 12, 1990

C & A CARBONE, INC.,
Petitioner(s)

for a Judgment Pursuant to Art. 78 of the
Civil Practice Laws and Rules,

-against-

CHARLES E. HOLBROOK, Supervisor of the Town of Clarkstown, JOHN R. MALONEY, STEVEN C. KUNIS, ANN MARIE SMITH and RALPH F. MANDIA, constituting the TOWN BOARD OF THE TOWN OF CLARKSTOWN,
Respondent(s)

ORDER

The following papers numbered 1 to 8, read on this motion by petitioner for Article 78 relief to compel the respondents to render a decision:

Notice of Petition/Petition/OSC/Affidavits	1, 2
Answering Affidavits	5, 6
Replying Affidavits	8
Filed papers	3, 4, 7

Upon the foregoing papers, it is ordered that this application is disposed of as follows:

Petitioner filed an application for a special permit with respondents on June 23, 1989. On July 12, 1989, the respondent Board referred the matter to the Town of Clarkstown Department of Planning and Development. In September, 1989, the Planning Board recommended approval of the special permit and the respondent Board held a public hearing on November 14, 1989. A traffic study was subsequently filed on December 10, 1989 pursuant to the respondent Board's request.

When a Town Board reserves to itself the responsibility to pass on applications for special permits instead of delegating the responsibility to the Board of Appeals, it is subject to the same time restraints under the Town Law as the Board of Appeals. *Town of Huntington v. Town of Oyster Bay*, 57 Misc 2d 821. Pursuant to Town Law Sec. 267(5), the Board of Appeals has sixty (60) days to render a decision.

The matter was fully submitted on December 10, 1989. To date, respondents have not made a determination.

Accordingly, this application is granted to the extent that the respondents are directed to render a decision on petitioner's special permit application within forty-five (45) days from the date hereof.

Dated: Oct. 18, 1990 Ent: 10/9/91

/s/ Illegible
A.J.S.C.

To: Granik, Silverman, Sandberg, Campbell
Nowicki and Resnik
Attorneys for Petitioner
254 So. Main St., PO Box 370
New City, NY 10956

Murray N. Jacobson, Esq.
Town Attorney, Town of Clarkstown
10 Maple Avenue
New City, NY 10956

Exhibit B to First Amended Answer—
Order of the Hon. Alfred J. Weiner, A.J.S.C.,
Dated February 27, 1991 [298-299]

SUPREME COURT—STATE OF NEW YORK
IAS PART: ROCKLAND COUNTY

Present: HON. ALFRED J. WEINER
Acting Justice of the Supreme Court

Index No. 7189/90
Motion Date Jan. 4, 1991

C&A CARBONE, INC.,
Petitioner(s)

for a Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules

-against-

CHARLES E. HOLBROOK, Supervisor of the Town of Clarkstown, JOHN R. MALONEY, STEVEN C. KUNIS, ANN MARIE SMITH and RALPH F. MANDIA, constituting the TOWN BOARD OF THE TOWN OF CLARKSTOWN,
Respondent(s)

ORDER

The following papers numbered 1 to 11, read on this motion by petitioner for Article 78 relief:

Notice of Petition/Petition/OSC/ Affidavits	1, 2
Answering Affidavits	5
Replying Affidavits	9
Filed papers	3, 4, 6-8, 10, 11

Upon the foregoing papers, it is ordered that this application is granted.

Pursuant to petition dated June 23, 1989, petitioner submitted an application to the Town Board of the Town of Clarkstown (hereinafter the board) seeking a special permit to allow the maintenance and use of a portion of the premises as a "recycling facility" as such term is defined in Section 106.3 of the Zoning Code of the Town of Clarkstown.

The premises are located on Western Highway, West Nyack, New York, in a manufacturing zone and are currently being used as a truck repair facility. The parcel is in an area zoned to allow a recycling facility with a special permit.

A public hearing was held on November 14, 1989. On November 27, 1990, the board denied petitioner's special permit application to conduct a recycling facility for the reasons of public health, safety and welfare.

Petitioner now seeks to vacate the board's determination alleging that it was arbitrary, capricious, unreasonable and was without foundation in fact or law. Respondents oppose the application claiming there will be increased traffic congestion and the petitioner will use the facility as an illegal dump.

Prior to the public hearing, the Rockland County Planning Board approved the application subject to certain conditions and the Clarkstown Department of Environmental Conservation reported no environmental impact.

At the public hearing, several residents made statements expressing their concerns over increased traffic congestion if the application was granted. Subsequently, the petitioner submitted a detailed traffic study report concluding that the flow of traffic on Western Highway is "stable and uncongested, with a great deal of unused capacity available to accomodate future increases in traffic". Respondents did not conduct their own traffic study.

Where a legislative body reserves to itself the power to grant a special permit, it is free to consider matters related to the public welfare. *Cummings v. Town Board,* 62 NY2d 833. The only limitation upon the exercise of this discretion is that it must not be arbitrary or capricious. *Matter of Buitenkant v. Robohm,* 122 AD2d 791.

An ordinance which permits a special exception use in a particular zoning district amounts to a legislative finding that the use accords with the zoning plan and that it will not adversely affect the surrounding area. *Matter of C&B Realty Co. v. Town Board of the Town of Oyster Bay,* 139 AD2d 510.

As against the traffic experts' report submitted by petitioner, there are only the general objections of neighboring land owners which are insufficient to justify denial of a special permit. *Matter of North Shore Equities v. Fritts,* 81 AD2d 985. *Matter of Huntington Health Care Partnership v. Zoning Board of Appeals,* 131 AD2d 481.

Special permit applications may not be denied without adequate evidence to support such denial. *R&T Realty Assoc. v. Amelkin,* 145 AD2d 636. The lack of evidence to support the findings of the board that the application was denied for reasons of public health safety and welfare is not overcome by the board's contentions that they were, in part, based upon the personal knowledge of its members, inasmuch as the board's determination rendered contains only conclusory statements without supporting facts, such as a traffic study, thereby precluding judicial review. *Matter of C&B Realty Co. v. Town Board of the Town of Oyster Bay,* supra.

Additionally, respondents' contention that petitioner will utilize the facility as a dump in violation of the zoning law is totally without basis.

Accordingly, the board's denial of the special permit was improper. *Matter of Lee Realty Co. v. Village of Spring Valley,* 61 NY2d 892.

The board is directed to issue the special permit subject to the possible imposition of reasonable conditions such as those recommended by the Rockland County Planning Board, the Clarkstown Planning Board or any other reasonable conditions, which will minimize any adverse impact upon the surrounding area. *Matter of Old County Burgers Co. v. Town Board,* 127 AD2d 772.

To: Granik, Silverman, Sandberg,
Campbell, Nowicki & Resnik
Attorneys for Petitioner

MURRAY N. JACOBSON, ESQ.
Town Attorney/Respondent

Dated: Feb. 27, 1991 Ent:—— /s/ [Illegible]
A.J.S.C.

Exhibit B to Silverman Affidavit—
Affidavit of Angelo Carbone, Sworn to April 29, 1991
[331-339]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

91 CIV. 2105 (CLB)

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., and C & C REALTY, INC.,
Plaintiffs,

-against-

THE TOWN OF CLARKSTOWN and CLARKSTOWN RECYCLING CENTER, INC.,
Defendants.

AFFIDAVIT IN SUPPORT

STATE OF NEW YORK)
) ss.:
COUNTY OF ROCKLAND)

ANGELO CARBONE, being duly sworn, deposes and says:

1. I am the President of C & A Carbone, Inc., Recycling Products of Rockland, Inc. and C & C Realty, Inc., plaintiffs in this action. As such, I am fully familiar with the facts set forth in this affidavit, and this affiidavit is respectfully submitted to the Court in support of an application brought on by our attorneys for a temporary restraining order.

2. The relief sought herein is a temporary restraining order against the enforcement of a statute which I

believe is void on its face or, if not void on its face, so clearly violative of my Constitutional and statutory rights that this Court should enjoin its enforcement. The statute is only being enforced against the plaintiffs in this case because there are no other business entities in the Town of Clarkstown which are involved in refuse disposal within the terms of the Local Law.

3. Our business is relatively simple to describe. We do the following:

(a) There is brought to our facility refuse which emanates from sources outside of the State of New York, and it is brought to our facility by various licensed interstate commerce carriers.

(b) Refuse is brought to us from areas within the State of New York but not emanating in the Town of Clarkstown.

(c) This refuse is processed and that which is recyclable is baled or otherwise packaged and sold to facilities out of the State of New York.

(d) The remaining refuse is baled and similarly sold to users of this refuse outside of the State of New York. Our users are termed "resource recovery centers" which, in everyday English, translates facilities which burn the refuse to create power. In some instances, the users of our refuse are landfills. The shipments to the users of our refuse are likewise made out of state on trucks which are duly licensed by the I.C.C.

4. Our charge to those who dispose of their refuse at our facility is $70 per ton.

5. Being the only such facility in the Town of Clarkstown, competition has nevertheless developed. Our existence as a competitor of the Town of Clarkstown has as its genesis in contractual arrangements by the Town with its co-defendant, Clarkstown Recycling Center, Inc. The relationship has the following attributes.

(a) All waste emanating in the Town of Clarkstown must by Local Law be brought to a facility constructed by Clarkstown Recycling on property owned by the Town of Clarkstown.

(b) At this point, Clarkstown Recycling bales the refuse and ships it out of the State to various landfill operators, including the very same landfills to which some of our waste is shipped. Clarkstown has also contacted our trucking brokers (following a police seizure of our records) seeking the names and locations of those "garbage-to-energy" facilities to which our non-landfilled waste is shipped.

(c) The agreement between the Town of Clarkstown and its co-defendant, Clarkstown Recycling, is that the co-defendant will charge $81 per ton to the local refuse haulers that collect Clarkstown refuse who must, by license and Town legislation, deposit Clarkstown refuse at the facility erected by Clarkstown Recycling. The collectors pay $81 per ton to Clarkstown Recycling. (The Town of Clarkstown has entered into an agreement with the adjoining Town of Orangetown to handle its refuse at a cost of $82 per ton. Where the additional $1 ultimately winds up is not yet known.)

(d) The defendant Clarkstown Recycling has built this facility to perform the above functions with its own or borrowed funds; and in order to assure its profitability, it has received from the defendant Town of Clarkstown a guarantee of tonnage which, when multiplied by the $81 per ton, will pay off the capital investments, the operating costs and, we presume, allow a modest profit. The agreement provides that at the expiration of five years, the Town can acquire the multi-million dollar facility for the payment of $1.00.

6. If the above recitation of facts represented the totality of the relationships between plaintiffs and defendants, no one could complain because it would merely

mean there was another competitor. The fact that our charge is $72 per ton and the Town's is $81 or $82 would be a competitive advantage to us. To destroy its competition, at least with respect to refuse emanating in the Town of Clarkstown, would be an advantage to Clarkstown Recycling.

7. Not content with letting economics dictate whose business will be allowed to remain, the Town of Clarkstown has passed Local Law No. 9 of 1990. Local Law No. 9 of 1990 is fully set forth in Exhibit "A" annexed hereto. The critical portion of Local Law No. 9 of 1990 is Section 5. Section 5 takes the position that any refuse physically within the Town of Clarkstown is subject to the Clarkstown ordinance, its origin being immaterial, and, under the circumstances, must be disposed of at Clarkstown facility. Any refuse physically found within the Town of Clarkstown by legislative action makes it Clarkstown refuse.

8. In the enforcement of this law, which of course has the effect of placing your deponent out of business, the Town has used its full powers, inclusive of police powers, to enforce the ordinance. Annexed hereto and marked Exhibit "B" is an affidavit from Gil Font, one of the trucking brokers, setting forth the participation of the Clarkstown Police in the enforcement of the ordinance. Annexed hereto and marked Exhibits "C" and "D", respectively, are affidavits submitted by two Police Officers of the Town of Clarkstown detailing in less graphic terms their participation in the enforcement of the Town's ordinance.

9. In the affidavits of the Police Officers, which affidavits appeared in an application by the Town for a judicial enforcement of its ordinance, they make reference to the fact that certain of the refuse seemed to emante from the Town of Clarkstown. The only answer which can be given with respect to that allegation is that the area in which the Police Officers examined the refuse they

had taken from out-of-state sources was at the place of business of Clarkstown Recycling. There will be submitted, should this matter ever proceed to trial, testimony that the refuse was examined at the identical location where the Town of Clarkstown's refuse was deposited. This comingling would be unavoidable but would have the desired result of showing that there was Clarkstown refuse at the site. There is further evidence of this transparent attempt to show a local law violation by virtue of the fact that the weight going in was 700 pounds less than the weight for which a charge was being made.

10. The Town of Clarkstown in the pursuit of the enforcement of its ordinance has brought an application before the Supreme Court, Rockland County, in which it has requested judicial enforcement of its ordinance which declares that any refuse physically within the Township must be disposed of at the facility of its co-defendant, Clarkstown Recycling. The Town has also sought an injunction prohibiting the plaintiffs from taking Clarkstown refuse to any location other than the facility of Clarkstown Recycling. Since the plaintiffs hardly handle or deal with any Clarkstown refuse, the question of enjoining such conduct was moot and of no moment. The Supreme Court in Rockland County has refused to issue an injunction with respect to refuse emanating from outside of the Township. At a conference with respect to the application of the Town of Clarkstown, we agreed to place a $10,000 bond with respect to our continued handling of non-Clarkstown refuse, the alternative being totally forced out of business.

11. The police harassment along the New York State Thruway and other interstate roads continued with respect to shipments coming to our place of business, and finally a loud enough complaint was heard by Justice Lefkowitz handling the injunction matter so that the harassment stopped.

12. The Town's position is clearly and articulately set forth in an affidavit submitted in the Supreme Court action by the Supervisor of the Town. (See Exhibit "E" attached hereto.) Local Law No. 9 of 1990 has an economic purpose; its purpose is to help the Town meet its contractual guarantee to its co-defendant so that the facility will never be in a position to ask the Town to pay a penalty for failure to meet their minimum tonnage guarantee. The Town by Local Law No. 9 of 1990 has now ensured that its minimum guarantee will be met by appropriation of the plaintiffs businesses. The Town having assured compliance with its contractual provisions, will in five years be the recipient of a multi-million dollar facility for $1.00. There will be no competition as it has been legislated out of existence. The Town does this for economic reasons and not as an instrument or manner of accomplishing a governmental policy. It is the money which is important.

13. This injunction is being sought because the ordinance is so clearly in violation of the commerce clause of the Constitution, is so violative of the Federal Antitrust Act and is so violative of your deponent's civil rights that in order to continue in business, the Town should be temporarily stopped from legislating its own economic advantage.

14. The Town, in the pursuit of its own economic betterment, has stated that the facility and businesses of your deponent are subject to a special permit which would allow plaintiffs' use in the zoning designation of the real property. We have applied for the special permit; the application was met with silence. The application had been approved by the various subsidiary boards and administrative officials, but the Town took no action. A mandamus petition was brought against the Town to have it decide the application for a special permit for the very use and purposes that are set forth herein. The Court directed the Town to make a decision on our application. (See Exhibit "F" attached hereto.) The Town, which should come as no surprise to the Court, denied

the application. The denial was appealed in an Article 78 proceeding; the denial was overturned with appropriate directions to issue the permit. (See Exhibit "G" attached hereto.) The Town has appealed the determination to the Appellate Division, Second Department, and has made full use of the statutory stay granted to a municipality. Whether the appeal will be prosecuted or not is a matter of conjecture for at the present time, notwithstanding the limitations of time to process an appeal in the Appellate Division, no record or brief has as yet been received.

15. Your deponent has been in business since 1974 performing the functions as set forth in the opening of this affidavit. Your deponent would like to continue in business performing the functions as set forth in this affidavit. However, when one's competitor has the right to legislate and to make use of the police force to destroy competition, it is extremely difficult to stay in business. There is no question that our facility performed the functions as set forth in this affidavit for the very simple reason that for a period of some three years prior to the Town of Clarkstown becoming our competitor, we performed all of our services for the Town. During the approximately three-year period of time that we were performing these very same functions for the Town and paid by the Town, no question of our legality, operating permits and licensing by the DEC was ever brought up.

16. We maintain that our licensing with the DEC is proper. We continue in operation as best we can under the circumstances, but the Town has now engaged in a series of actions which all, of course, appear in the press and suggest that what we do is no longer legal or proper, although we had performed these services in the past for the Town. This is most clearly reflected in the fact that the Town of Clarkstown, prior to denial of its injunctive application and the full use of its police force, served upon us a search warrant and took all of our records. The

original records were never returned; copies were returned; and strangely the originals of our records, pursuant to a convenient subpoena, were given to the U.S. Attorney.

17. The Town of Clarkstown has been engaged in a series of trial-by-newspaper articles in which we are characterized as part of an illegal "Cosa Nostra" operation which, in addition to being untrue, is defamatory.

18. The Town has come to the conclusion that refuse, once to be avoided, is a substantial source of income. Your deponent knew that years ago, and one does not have to be a member of the illegal underworld, according to the Town, in order to realize that refuse is profitable. The Town in its sudden realization of profitability has decided that the profit belongs to it rather than to your deponent. It is this sudden realization and the actions of the Town which precipitate this litigation and prompt our request for damages and treble damages for the acts we have complained of herein.

/s/ Angelo Carbone
ANGELO CARBONE

[Notary Omitted in Printing]

Exhibits to Reply Attorney's Statement of Glickel—Correspondence, Dated June 4, 1991 and Simplified Informations, each Dated June 8, 1991 [382-385]

New York State Department of Environmental Conserv.
Region 3
21 South Putt Corners Road
New Paltz, NY 12561-1696
914-255-5453

Certified Mail
Return Receipt Requested
P 426 205 935

June 4,

Mr. Angelo Carbone
C&A Carbone
183 Western Highway
West Nyack, New York 10994

Re: Facility No. 44T04
Clarkstown (T), Rockland County

Dear Mr. Carbone:

Yesterday, you were advised by Environmental Conservation Officer Mazurkiewicz that your facility appears to be operating in non-compliance with Special Condition 16 of the Permit to Operate the subject solid waste management facility. This condition requires that "this facility be operated in accordance with the plans and reports filed by the permittee . . .". The submitted and approved report, received March 19, 1987 states that the incoming waste will be approximately 90 per cent cardboard. A review of your three (3) Annual Reports covering the period from January 2, 1988 to June 30, 1990 reveals that the incoming waste stream is not consistent with this approved waste stream composition, because the wastes other than cardboard greatly exceed 10 per cent of the incoming waste stream.

The report dated November 20, 1989, which covered the period from January 2, 1988 to December 31, 1988, revealed that the cardboard shipped from your facility was 10.9 per cent of the incoming waste stream. The report dated November 10, 1989, which covered the period from January 2, 1989 to November 18, 1989, revealed that the cardboard shipped from your facility was 10.2 per cent of the incoming waste stream. The report dated September 17, 1990, which covered the period from November 19, 1989 to June 30, 1990, revealed that the cardboard shipped from your facility was 14.1 per cent of the incoming waste stream. Assuming that only half of the incoming cardboard was able to be recycled, the total of incoming cardboard was less than one-third of the proposed amount in the application. Conversely, the solid wastes other that cardboard, which were proposed in the application to be a maximum of 10 per cent, are at a minimum, over 70 per cent.

This is clearly a violation of the aforementioned permit condition. Violations of this nature are punishable by appropriate fines and penalties and may serve as the basis for permit revocation as well. The Department is reviewing its enforcement options with regard to past and recent violations. In the meantime, you are advised that continued acceptance of the various wastes consistent with the proportions demonstrated in your Annual Reports will be considered as a violation of Part 360 and will be subject to enforcement action by the Department.

If you have any questions concerning this matter, please do not hesitate to contact Mr. Ajay Shah at the White Plains suboffice, telephone (914) 761-6660 or myself at this office.

Respectfully,

/s/ Richard Gardineer, P.E.
RICHARD GARDINEER, P.E.
Regional Solid Waste Engineer
Region 3

cc: R. Mana
Town of Clarkstown
Town of Orangetown
J. Ferry
A. Ciesluk
ECO Mazurkiewicz
A. Klauss/A, Shah

(5)

No. 92-1402

Supreme Court, U.S.
FILED
JUL 16 1993
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

---

BRIEF FOR PETITIONERS

BETTY JO CHRISTIAN
Counsel of Record
PAUL J. ONDRASIK, JR.
DAVID A. PRICE
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

DAVID SILVERMAN
KENNETH RESNIK
GRANIK SILVERMAN
254 South Main Street
New City, New York 10956-0370
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a local law requiring disposal of all trash, regardless of origin, at a designated local facility, and prohibiting the export of such trash out of state, constitutes a burden on and a discrimination against interstate commerce in violation of the Commerce Clause of the United States Constitution.

LIST OF PARTIES

Petitioners

C & A Carbone, Inc.

Recycling Products of Rockland, Inc.

C & C Realty, Inc.

Angelo Carbone

Respondent in Interest

Town of Clarkstown, New York

Other Respondents

"John Doe 1 through 6"

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. FLOW CONTROL LAWS ARE A CONTINUATION OF LONG-STANDING EFFORTS BY LOCAL JURISDICTIONS TO ISOLATE THEIR TRASH PROBLEMS FROM THE NATIONAL ECONOMY	12
II. CLARKSTOWN'S FLOW CONTROL ORDINANCE IS PER SE INVALID AS A DIRECT RESTRICTION ON INTERSTATE COMMERCE	15
A. Local Law 9's Restriction on the Export of Trash Is An Overt Discrimination Against Interstate Commerce	16
B. There Is No Factor Unrelated to Economic Protectionism That Could Justify Local Law 9	25
C. Any Legitimate Local Concern Here Can Be Met Through Non-Discriminatory Alternatives	27

TABLE OF CONTENTS—Continued

	Page
III. CLARKSTOWN'S FLOW CONTROL ORDINANCE VIOLATES THE COMMERCE CLAUSE EVEN IF ITS EFFECT ON INTERSTATE COMMERCE IS REGARDED AS INCIDENTAL	30
A. The Local Benefits of the Clarkstown Ordinance Are Limited	31
B. The Burden Imposed By Local Law 9 on Interstate Commerce Is A Heavy One	31
C. The Putative Local Benefits Could Be Obtained By Non-Discriminatory Means	36
CONCLUSION	38

TABLE OF AUTHORITIES

CASES

	Page
Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)	27
Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)	15
Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959)	37
Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992)	*passim*
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)	*passim*
Container Corp. of Carolina v. Mecklenburg County, No. 92 cv-154-MU (W.D.N.C. June 14, 1992)	32
DeVito v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I.), *aff'd*, 947 F.2d 1004 (1st Cir. 1991)	33
Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992)	*passim*
Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)	20, 21, 22
H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949)	16, 20
Hughes v. Oklahoma, 441 U.S. 322 (1979)	15, 19-21
J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl. Protection, 857 F.2d 913 (3d Cir. 1988)	32
Johnson v. Haydel, 278 U.S. 16 (1928)	22
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981)	35
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)	20, 21
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	*passim*
Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978)	35, 37
South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984)	19, 22-23
Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945)	36-37

TABLE OF AUTHORITIES—Continued

	Page
Sporhase v. Nebraska, 458 U.S. 941 (1982)	27
Toomer v. Whitsell, 334 U.S. 385, *reh'g denied*, 335 U.S. 837 (1948)	22
Waste Recycling Inc. v. Southeast Alabama Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993)	29
Waste Systems Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993)	26-27, 31, 32
West v. Kansas Natural Gas Co., 221 U.S. 229 (1911)	17, 20
Wyoming v. Oklahoma, 112 S. Ct. 789 (1992)	25, 31-32

CONSTITUTION

U.S. Const. art. I, § 8, cl. 3	*passim*

STATUTES

Federal

28 U.S.C. § 1257(a)	2

State

Colo. Rev. Stat. § 30-20-107	14
Conn. Gen. Stat. § 22A-220A	14
Del. Code Ann. tit. 7, § 6406(31)	14
Fla. Stat. ch. 403.713	14
Haw. Rev. Stat. § 340A-3(a)	14
Ill. Rev. Stat. ch. 34, para. 5-1047	14
Ind. Code § 36-9-31-3, 36-9-31-4	14
Iowa Code § 28G.4	14
La. Rev. Stat. § 30:2307(9)	14
Me. Rev. Stat. Ann. tit. 38, § 1304-B(2)	14
Minn. Stat. § 115A.80	14
Miss. Code Ann. § 17-17-319	14
Mo. Rev. Stat. § 260.202	14
N.C. Gen. Stat. § 130A-294	14
N.D. Cent. Code, § 23-29-06(6), 23-29-06(8)	14
N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5	14
N.Y. Laws ch. 569	14
Ohio Rev. Code Ann. § 343.01(H)(2)	14

TABLE OF AUTHORITIES—Continued

	Page
Or. Rev. Stat. § 268.317(3), 268.317(4)	14
Pa. Stat. Ann. tit. 53, § 4000.303(e)	14
R.I. Gen. Laws § 23-19-10(40)	14
Tenn. Code Ann. 68-211-814	14
Va. Code Ann. § 15.1-28.01	14
Vt. Stat. Ann. tit. 24, § 2203a, 2203b	15
W. Va. Code § 240-2-1h	15
Wash. Rev. Code §§ 35.21.120, 36.58.040	15
Wis. Stat. § 159.13(3), 159.13(11)	15

Local

Local Laws, 1990, No. 9 of the Town of Clarkstown, New York	*passim*

LEGISLATIVE MATERIALS

Interstate Transportation of Solid Waste: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess. (1991)	34, 35

MISCELLANEOUS

The Federalist No. 42 (Madison)	37
Leila Fiester, *Foes Push for '94 Referendum on Waste Disposal Fees*, Washington Post, March 25, 1993, at M1	29
Angela Logomasini, *Municipal Solid Waste Mismanagement: Government Failure and Private Alternatives*, 3 J. Regulation and Social Costs 61 (1993)	5, 33
Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste At Home*, 76 Minn. L. Rev. 1219 (1992)	5, 12
Kelly Outten, *Waste To Energy: Environmental and Local Government Concerns*, 19 U. Rich. L. Rev. 373 (1985)	34
Mark Ryan, *Courts Complicate Solid Waste Financings*, Standard & Poor's Creditweek Municipal, November 9, 1992, at 69	28-29

TABLE OF AUTHORITIES—Continued

	Page
Solid Waste Price Index, Solid Waste Digest, June 1993, at i	27
Jo-Walter Spears, *Solid Waste Management: A Short History, in* ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulation, and Contracts and Financing* 177 (1988)	12
Sup. Ct. R. 29.1	2
U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action* (1988)	35

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1402

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

BRIEF FOR PETITIONERS

OPINIONS BELOW

The decision of the Supreme Court, Appellate Division, Second Department of the State of New York was rendered on August 31, 1992. That decision is reported at 182 A.D.2d 213 and 587 N.Y.S.2d 681 and is reproduced at pages 1a-15a of the appendix to the petition for certiorari ("Pet. App."). The decision of the Court of Appeals of the State of New York denying petitioners' motion for leave to appeal, rendered on October 27, 1992, is reported at 80 N.Y.2d 260 and 605 N.E.2d 874 and is reproduced at Pet. App. 47a.

The July 15, 1991 decision of the court of original jurisdiction, the Supreme Court of the State of New York, County of Rockland, is unreported and is reproduced at Pet. App. 22a-33a. The September 16, 1991 opinion of that court upon reargument is unreported and is reproduced at Pet. App. 16a-21a.

The July 11, 1991 decision of the United States District Court for the Southern District of New York in a related action between the parties is reported at 770 F. Supp. 848 and is reproduced at Pet. App. 34a-46a.[1]

JURISDICTION

The decision of the Supreme Court, Appellate Division, Second Department of the State of New York was issued on August 31, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Commerce Clause of the United States Constitution, art. I, sec. 8, cl. 3, which provides in pertinent part: "The Congress shall have Power . . . To regulate Commerce . . . among the several States. . . ."

This case also involves Local Laws, 1990, No. 9 of the Town of Clarkstown, New York ("Local Law 9"), which is reproduced at Pet. App. 48a-54a. Most pertinent, Sections 3(C)-(D) and 5(A) provide that:

> Section 3. Collection and Disposal of Acceptable Waste
>
> * * * *

[1] All parties to the proceeding below are identified in the list of parties, *supra*. "John Doe 1 through 6" were named defendants below, but to the best of petitioners' knowledge, do not refer to any real persons or entities. There are no parent companies or non-wholly-owned subsidiaries to be listed pursuant to Rule 29.1 of this Court.

> C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility located at Route 303, West Nyack, New York or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code . . . . As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown.
>
> D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than its facilities or sites set forth in Paragraph "C" above.
>
> * * * *
>
> Section 5. Acceptable and Unacceptable Waste Generated Outside the Town of Clarkstown
>
> A. It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pursuant to agreement with the Town of Clarkstown and recyclables . . . brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code.

Pet. App. 51a-53a; R. 67-69.

STATEMENT OF THE CASE

On August 7, 1989, the New York State Department of Environmental Conservation ordered the Town of Clarkstown, New York to close a landfill that it had operated since the 1950's, citing repeated environmental violations. Pet. App. 3a; R. 202. The order further required the town to establish a transfer station to replace the

landfill as a means of handling the town's trash. Pet. App. 35a; R. 219. A transfer station is a facility that receives unsorted trash, bales it, and sends it onward to disposal sites such as landfills.

Faced with the problem of financing the construction and operation of the transfer station, Clarkstown entered into an arrangement with a private contractor, Clarkstown Recycling, Inc. Under this agreement, the contractor would construct the transfer station and operate it for five years. Pet. App. 4a, 35a; Affidavit of Charles E. Holbrook, Supervisor of the Town of Clarkstown, J.A. 10, R. 59. During this five year period, the town guaranteed the contractor a minimum of 120,000 tons of trash to process each year at a price of $81.00 per ton. *Id.* If this guaranteed quantity was not forthcoming, the town agreed to pay the contractor the difference in lost revenue. *Id.* In return for this guarantee, the town was given the right to acquire the facility at the end of five years for a price of one dollar. *Id.*

If the town had simply entered into the agreement, this litigation would never have occurred. However, in an effort to protect its contractor from competition, and thereby minimize the possibility that the town would have to pay under its guarantee, the town also enacted a local ordinance—Local Law 9. That ordinance requires that *all* acceptable, non-recyclable waste finding its way into Clarkstown—whether originating in the town, in other points in New York, or out of state—must be disposed of at the town's designated transfer station.[2] Pet. App. 24a-25a; Local Law 9, §§ 3(C) and 5(A), Pet. App. 51a, 53a. Thus, Local Law 9 effectively prohibits the export

[2] "Acceptable" waste under Local Law 9 includes residential, commercial, and industrial solid waste, but does not include hazardous waste (i.e., waste designated as hazardous under various federal statutes), pathological waste (i.e., various types of medical waste and other types of infectious or biohazardous waste), and sludge (i.e., waste from a sewage treatment plant, wastewater treatment plant, water supply treatment plant, or air pollution control facility). Local Law 9 § 1, Pet. App. 48a-49a.

of trash to points outside the town unless first processed by the designated facility.

Ordinances of this type, requiring that certain types of waste in a locality must be brought to a designated facility and cannot be exported, are known as "flow control" ordinances. *See* Angela Logomasini, *Municipal Solid Waste Mismanagement: Government Failure and Private Alternatives*, 3 J. Regulation and Social Costs 61, 63-64 (1993); Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste At Home*, 76 Minn. L. Rev. 1219, 1230-31 (1992) (student note). They have proliferated in recent years as a convenient means of financing local waste disposal projects and facilities by assuring a local facility that it will have a steady supply of waste to process and will therefore be able to operate cost-effectively. Clarkstown's ordinance falls squarely within this category. Indeed, the town has admitted throughout this action that Local Law 9 was enacted for the economic purpose of avoiding payments under the minimum tonnage guarantee to its contractor. *See* Charles Holbrook Aff., J.A. 9-11, R. 58-61; *see also* Pet. App. 43a.

This case began as a state court action by the town against petitioners to enforce Local Law 9. Until issuance of the decision below, petitioners operated a recycling center in Clarkstown.[3] This recycling center re-

[3] Petitioners' facility is an authorized recycling center. Pet. App. 6a.

The town sought in the courts below to characterize petitioners' facility as a "transfer station." Pet. App. 26a. Because petitioners' bypassing of the town-designated facility is prohibited by Local Law 9 whether their operation is characterized as a recycling center or a transfer station, the choice of labels is not directly material to this action. The town may have been attempting to establish a record that would enable it to close petitioners' facility pursuant to a local zoning ordinance, not challenged here, under which all transfer stations other than the town-designated transfer station are prohibited. In any event, the town's characterization was never adopted by the courts below.

ceived trash from customers in New Jersey and New York State, which was processed at the price of $70.00 per ton. At the recycling center, trash was separated into recyclable and non-recyclable parts. The recyclable parts were sent to out-of-state recycling processors. The non-recyclable trash was hauled out of state to landfills or to facilities that burn the waste to generate power. Pet. App. 35a. Petitioners shipped 150 tons of trash per week to sites in Ohio, Delaware, Pennsylvania, Kentucky, Indiana, and Florida. Pet. App. 26a.

While Local Law 9 permits approved recycling centers, such as petitioners' operation, to send recyclable materials out of town for processing, it prohibits the shipment of the non-recyclable portion of the trash to points out of town or out of state; it requires such trash to be sent instead to the town's designated trash disposal facility.[4] Thus, as applied to petitioners, the ordinance bans the movement of the nonrecyclable trash from the recycling center directly to out-of-state destinations.

As a result, the ordinance has had the effect of putting petitioners out of business despite their significant cost advantage over the town's designated transfer station. The matter was brought to a head in March 1991 by a highway accident involving an Ohio-registered tractor-trailer that was hauling approximately 23 tons of baled trash from the petitioners' facility to an Indiana landfill. Pet. App. 6a. Upon investigation of the accident, local Clarkstown police determined that this trash, which had originated at points both within and without New York state, was bypassing the town's designated transfer station. Thereafter, the police placed petitioners' operation under surveillance; the police stopped on the highway a number of tractor-trailers entering and leaving petitioners' facility to search for non-recyclable trash that likewise was bypassing the town's transfer station. Finding such waste,

[4] Local Law 9 §§ 3(C) and 5(A), Pet. App. 51a, 53a.

the police seized the drivers' loads, notwithstanding the fact that at least some of the trash had originated out-of-state and all of it was headed out-of-state to locations in Illinois, Indiana, West Virginia and Florida.[5] Pet. App. 6a, 26a.

Armed with this evidence of non-compliance, the town sued petitioners in the Supreme Court of Rockland County on March 18, 1991, to enjoin them from disposing of their nonrecyclable trash at any site other than the designated facility. Pet. App. 6a-7a, 36a. In the First Amended Answer to the First Amended Complaint, petitioners asserted a defense based on the invalidity of Local Law 9 under the Commerce Clause. Pet. App. 55a, R. 407.[6]

On March 27, 1991, while the state court action was pending, petitioners brought an action in the United States District Court for the Southern District of New York, challenging the local ordinances as, *inter alia*, violative of the Commerce Clause. *C & A Carbone, Inc. v. Town of Clarkstown and Clarkstown Recycling Ctr.*, No. 91 Civ. 2105 (CLB) (S.D.N.Y.). On July 11, 1991, the federal

[5] These highway stops and searches were graphically described in the affidavit of Gil Font, an ICC-licensed motor carrier from Hartford, Alabama:

> On or about March 11, 1991, three (3) trucks were stopped on the New York State Thruway by what the drivers described as a "SWAT Team." These drivers were forced from their cabs and lined up along side their trucks while police officers searched the trucks for solid waste. There were no violations of any traffic laws nor were my drivers presented with any warrants for the detention or search of their trucks. The police then confiscated these loads, without warrants or other legal process and directed my drivers to refrain from doing any business at the Carbone facility stating that every truck and its contents would be seized and impounded. . . .

R. 84.

[6] Petitioners also asserted defenses at that time under the Due Process Clause and state law.

court (Brieant, C.J.) granted a preliminary injunction against the enforcement of Local Law 9. Pet. App. 45a. That court held it "likely" that petitioners could demonstrate the law to be an impermissible burden on interstate commerce:

> Although ostensibly Local Law No. 9 was promulgated to protect the health and environment of the residents of Clarkstown from the hazards associated with dumping solid wastes in landfills, the Town cannot legislatively slow down or prohibit the flow of commerce, in this case, interstate solid waste products, by artificially inflating the price of processing solid waste generated without the Town from $70/ton to $81/ton and thereby augment the economic security of the Town.
>
> It does not seem likely that the Town's interest in meeting its tonnage requirements to defendant Clarkstown Recycling Center, Inc., and in so doing avoid a penalty for each ton under the requisite annual minimum of 120,000 tons . . . can constitutionally justify the requirement that solid waste processors and carters expend the sum of $81/ton, rather than the $70/ton they paid prior to the enactment of Local Law No. 9, to process and cart the same without of Town solid waste to the same without of Town facilities. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) . . . .

Pet. App. 43a.

Despite the preliminary injunction issued by the federal court, proceedings continued in the Supreme Court of Rockland County. The town filed a motion for preliminary injunction. By stipulation, this motion was treated as a motion for summary judgment. Pet. App. 22a. Both parties filed affidavits in support of their positions. *Id.* On July 15, 1991, the state court issued a decision holding Local Law 9 to be constitutional, granting summary judgment to the town, and issuing an injunction against petitioners. Pet. App. 32a. The state court held that

Local Law 9 did not violate the Commerce Clause because it treated trash originating out-of-state the same as trash originating in-state. Pet. App. 29a-31a. Wholly ignoring the export restriction, the court concluded that "defendants have failed to demonstrate that Local Law #9 has any 'demonstrable effect whatsoever on the interstate flow of goods.'" *Id.* at 30a.[7] As a result of this state court decision on the merits, the federal court dissolved its preliminary injunction.

On reargument, the state trial court again upheld the validity of the ordinance against Commerce Clause challenge, this time applying the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Despite uncontroverted evidence that the law was being enforced with respect to shipments of trash that included trash originating out of state and destined to points in other states, Pet. App. 26a, the court concluded that petitioners had not provided sufficient information concerning "the nature of their alleged interstate commerce activities" to upset the ordinance. Pet. App. 18a-19a. In so doing, the state court again made no mention of the fact that petitioners shipped *all* of their trash *to* out-of-state facilities after separation.

On appeal, the New York Supreme Court, Appellate Division, Second Department, affirmed the trial court's decision. Pet. App. 14a. Like the trial court, the Appellate Division did not address the impact of the ordinance on the export of trash. Rather, focusing solely on the origin of the trash subject to the ordinance, the Appellate Division held Local Law 9 valid under the Commerce Clause because it "applies evenhandedly to all solid waste procesed within the Town, regardless of point of origin," Pet. App. 11a. It also concluded that the $11 per ton differential in processing charges, if it had "any effect on the interstate flow of solid waste," was permissible in light

[7] The court also rejected petitioners' due process and state law claims.

of "the legitimate and significant public concerns underlying the local law. . . ." Pet. App. 12a. The Appellate Division took note of the contrary views expressed by the federal court, but stated that the federal decision "does not require that we rule in [petitioners'] favor here." *Id.* Thereafter, the New York Court of Appeals denied petitioners' motion for leave to appeal, Pet. App. 47a, and proceedings were instituted in this Court. This Court granted certiorari on May 24, 1993.

SUMMARY OF ARGUMENT

The efforts of states and localities to interfere with the free interstate movement of trash have now come full circle. Where trash was once an article of commerce that localities did not want, and where capacity for its disposal was once hoarded, the opposite is now frequently true. As local jurisdictions such as Clarkstown sponsor the construction and operation of new waste disposal facilities, they find that the new facilities need to process substantial quantities of trash to operate economically. Flow control laws, which are local restrictions on the export of trash, are attempts to hoard the trash located within the boundaries of a locality and thereby capture the fees for disposing of it. Because flow control laws are intended to reserve a valuable resource for local use, they have the same fundamental purpose as the restrictions on the import of trash struck down by this Court in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992); and *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992).

This Court's decisions have long established that the Commerce Clause forbids a state or a subdivision of a state from restricting the export of privately-owned articles of commerce. Nor can a state or one of its subdivisions require that an article of commerce be processed

locally before it enters the stream of commerce. Local Law 9, however, does exactly that. On its face, and as applied in this action against petitioners, Local Law 9 forbids individuals or companies located in Clarkstown from disposing of non-recyclable waste by sending it directly to out-of-town or out-of-state facilities that are willing to receive the waste for a fee. Moreover, this restriction applies both to locally-generated trash and to trash originating outside Clarkstown.

A law that "overtly blocks the flow of interstate commerce at a [locality's] borders" is subject to a "virtually *per se* rule of invalidity." *City of Philadelphia*, 437 U.S. at 624. Given its direct restriction on exports, the Clarkstown ordinance violates the Commerce Clause regardless of its motivation, since the "evil of protectionism can reside in legislative means as well as legislative ends." *Id.* at 626. But in any event, the clear purpose of the ordinance, on its face and as confirmed by the town supervisor, *is* economic protectionism—to assure the town-designated facility a supply of revenue-generating trash, thereby reducing the possibility that the town will have to pay that facility for a minimum quantity of trash pursuant to a "take or pay" guarantee. The town is pursuing this goal at the direct expense of out-of-town residents who would otherwise send their trash to petitioners' facility, which would in turn send the non-recyclable portion to out-of-state facilities for final disposal at lower cost.

In any event, even if the economic goals of the ordinance could somehow be deemed non-protectionist, they could be met through non-discriminatory means. If the town's designated facility cannot sustain itself by charging competitive rates, the town could offset the deficit by, for example, increasing local taxes or imposing utility surcharges. Other localities are using alternative, non-discriminatory approaches such as these to support new waste facilities.

Although Local Law 9 should properly be struck down under the Court's test of "virtual *per se* invalidity," the same result follows if the ordinance is instead analyzed under the balancing standard applicable to non-discriminatory laws that have a merely incidental effect on interstate commerce. When the local benefits of avoiding the need to compete for trash or to raise taxes or utility fees to fulfill a take-or-pay guarantee are weighed against the burden that an export restriction imposes on interstate commerce in the form of increased costs of trash disposal, elimination of competition through price or technological improvements, and disincentives to entry into the waste disposal business, it is clear that the burden on interstate commerce is excessive in relation to the local benefits. Thus, under either the balancing or *per se* approaches, the ordinance violates the Commerce Clause.

ARGUMENT

I. FLOW CONTROL LAWS ARE A CONTINUATION OF LONG-STANDING EFFORTS BY LOCAL JURISDICTIONS TO ISOLATE THEIR TRASH PROBLEMS FROM THE NATIONAL ECONOMY

Trash disposal has been a simmering national problem for at least a quarter of a century. As the United States became increasingly urbanized and as more disposable goods and containers found their way into the marketplace, localities had to find ways to deal with the mounting quantities of trash that were produced. At the same time, environmental concerns related to trash disposal assumed a higher profile in the national consciousness. *See* Jo-Walter Spears, *Solid Waste Management: A Short History, in* ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulation, and Contracts and Financing* 177 (1988); Mesnikoff, *supra*, at 1219-21.

The first reaction of local jurisdictions wrestling with trash problems was to attempt to hoard their own waste

disposal facilities by keeping foreign trash out. Thus state laws and local ordinances banning trash originating outside the town, or establishing higher fees for out-of-town than for local trash, proliferated. This Court had occasion to address this problem first in *City of Philadelphia*, where it held that waste is a legitimate article of commerce within the protection of the Commerce Clause, and struck down a state's efforts to ban the importation of waste to preserve limited landfill space. Then, this Court struck down under the Commerce Clause more sophisticated efforts to restrain the importing of waste in *Fort Gratiot* and *Chemical Waste Management*.

Within the past few years, however, a new wrinkle on the trash disposal problem has developed. In response both to new environmental requirements and to the declining capacity of existing landfills, some localities have had to close the landfills in which they previously disposed of trash at low cost. Of those localities, some have responded to the situation by relying on the existing nationwide market for trash disposal, sending household and industrial waste by truck or rail to facilities out of town or out of state.

Other localities have chosen to establish local waste disposal facilities, typically under contract with a private operator. Some of these new facilities take the form of landfills, which are now significantly more expensive to open and operate as a result of more advanced environmental safeguards. Some are waste-to-energy plants or other waste treatment facilities of various kinds. Still others, like the Clarkstown facility involved in this case, are simply transfer stations—*i.e.*, operations that process and bale the trash for shipment to facilities elsewhere for final disposal. *See* Pet. App. 3a.

The new trash facilities generally share one characteristic: they cost substantial amounts of money. These costs must, of course, be recovered over time either

through fees charged by the facility for its services or through public subsidies. The higher the volume of trash sent to a facility, the greater the ability of the facility to recover its own costs, and the less burdensome the facility is for the locality that has sponsored its construction and operation.

Hence, trash is no longer an unwanted commodity; it has instead become a valuable resource. In effect, trash is now the raw material needed by the new waste facilities. Localities have responded accordingly. Instead of seeking to hoard their landfills for their own citizens, as they had previously done, they now seek to hoard their trash. Some, such as Clarkstown, go even further and seek to appropriate all trash that finds its way within their borders.

The result has been the proliferation of so-called "flow control laws." There appear to be no reliable statistics as to the number of counties, municipalities, or other local government units that have actually adopted flow control ordinances. However, at least 27 states have enacted statutes that authorize local governments within the state to adopt such laws.[8] Most of these statutes provide

[8] Colorado (Colo. Rev. Stat. § 30-20-107); Connecticut (Conn. Gen. Stat. § 22A-220A); Delaware (Del. Code Ann. tit. 7, § 6406 (31)); Florida (Fla. Stat. ch. 403.713); Hawaii (Haw. Rev. Stat. § 340A-3(a)); Illinois (Ill. Rev. Stat. ch. 34, para. 5-1047); Indiana (Ind. Code § 36-9-31-3 & -4); Iowa (Iowa Code § 28G.4); Louisiana (La. Rev. Stat. § 30:2307(9)); Maine (Me. Rev. Stat. Ann. tit. 38, § 1304-B(2)); Minnesota (Minn. Stat. § 115A.80); Mississippi (Miss. Code Ann. § 17-17-319); Missouri (Mo. Rev. Stat. § 260.202); New Jersey (N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5); New York (1991 N.Y. Laws ch. 569, at 1687-89); North Carolina (N.C. Gen. Stat. 130A-294); North Dakota (N.D. Cent. Code, § 23-29-06(6) & (8)); Ohio (Ohio Rev. Code Ann. § 343.01(H)(2)); Oregon (Or. Rev. Stat. § 268.317(3) & (4)); Pennsylvania (Pa. Stat. Ann. tit. 53, § 4000.303(e)); Rhode Island (R.I. Gen. Laws § 23-19-10(40)); Tennessee (Tenn. Code Ann. 68-211-814); Vermont (Vt. Stat. Ann. tit. 24, § 2203a, 2203b); Virginia (Va. Code Ann. § 15.1-28.01); Washington (Wash. Rev. Code §§ 35.21.120, 36.58.040); West Virginia (W. Va. Code 240-2-1h); Wisconsin (Wis. Stat. § 159.13(3), (11)).

that a local authority may designate one or more facilities to receive all trash in the local jurisdiction. The result has been the Balkanization of waste facilities, as local jurisdictions take advantage of the opportunity to enact laws that require all trash to go to the designated facility and prohibit the export of trash to facilities in other localities and other states.

II. CLARKSTOWN'S FLOW CONTROL ORDINANCE IS PER SE INVALID AS A DIRECT RESTRICTION ON INTERSTATE COMMERCE

This Court has emphasized that the Constitution "was framed upon the theory that the people of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935). The Framers of the Constitution were guided by "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979).

Flow control laws, in which states or localities seek to advance their own economic interests by erecting barriers to the free movement of trash, epitomize the kind of Balkanization that the Commerce Clause was intended to prevent. The localities that have adopted flow control laws rightly see trash as a resource that generates revenue, and the localities therefore seek to hoard it for their own benefit. This Court, however, has noted the potential consequences of such parochial legislation:

> We need only consider the consequences if each of the few states that produce copper, lead, high-grade

> iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority. What fantastic rivalries and dislocations and reprisals would ensue if such practices were begun! . . . May Michigan provide that automobiles cannot be taken out of that State until local dealers' demands are fully met? . . . Could Ohio then pounce upon the rubber-tire industry, on which she has a substantial grip, to retaliate for Michigan's auto monopoly?

H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 538-39 (1949).

This case thus represents the flip side of the issue addressed by this Court in *City of Philadelphia*, and again in *Fort Gratiot* and *Chemical Waste Management*. In those cases this Court, applying the now-established law that trash is a legitimate article of commerce entitled to the protection of the Commerce Clause, invalidated local efforts to ban or restrain the import of trash into a locality. While the local ordinance here under review seeks to restrict the *export* of trash *out* of a locality, it suffers from the same constitutional deficiencies identified by this Court in *City of Philadelphia*, *Fort Gratiot*, and *Chemical Waste Management*, and for the very same reasons must also be struck down.

A. Local Law 9's Restriction on the Export of Trash Is An Overt Discrimination Against Interstate Commerce

In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court emphasized that "a law that overtly blocks the flow of commerce at a State's borders" is "the clearest example" of "simple economic protectionism." *Id.* at 624. As to such laws, "a virtually *per se* rule of invalidity has been erected." *Id.* This virtual *per se* rule applies without regard to a local jurisdiction's motives in adopting such laws, since "the evil of protectionism can

reside in legislative means as well as legislative ends," and even a "presumably legitimate goal" cannot be accomplished "by the illegitimate means of isolating the State from the national economy." *Id.* at 626-27. *City of Philadelphia* thus struck down a New Jersey law prohibiting the import of waste without a permit, ruling that such a law "falls squarely within the area that the Commerce Clause puts off limits to state regulation." *Id.* at 628.

The Court used this same "virtual *per se*" rule of invalidity more recently when, relying squarely on *City of Philadelphia*, it struck down the waste import restrictions involved in *Fort Gratiot* and *Chemical Waste Management*. Because "[n]o State may attempt to isolate itself from a problem common to the several States by raising barriers to the free flow of interstate trade," those restrictions could not stand even though they otherwise represented attempts to "respond to legitimate local concerns" [9] and the solid waste itself had "no value." [10] The principles utilized by this Court to strike down these parochial efforts represent no more than an application of a fundamental and long-recognized tenet of the Commerce Clause—that "in matters of foreign and interstate commerce there are no state lines." *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255 (1911).

These same principles govern the disposition of this case. The local law here under review, which restricts the *export* of trash to points outside the town, raises the same fundamental issues as the local measures invalidated in *City of Philadelphia*, *Fort Gratiot*, and *Chemical Waste Management*. While it seeks to keep waste materials in, rather than out, the impact on interstate commerce is

---

[9] *Chemical Waste Management*, 112 S. Ct. at 2015 n.6.

[10] *Fort Gratiot*, 112 S. Ct. at 2023; *see also City of Philadelphia*, 437 U.S. at 622-23.

the same—in both instances, the free movement of trash between the states is restrained.

The court below concluded that Local Law 9 "does not discriminate against interstate commerce" because it "applies evenhandedly to all solid waste processed within the Town, regardless of point of origin." Pet. App. 11a. But this rationale simply misses the point. The effect of Local Law 9 is to prohibit flatly the export of trash to points outside of Clarkstown unless the trash is first brought to the designated facility for processing. This type of restriction—"requiring business operations to be performed in the home [locality] that could more efficiently be performed elsewhere"—is "virtually *per se* illegal," even if the locality is "pursuing a clearly legitimate local interest." *Pike*, 397 U.S. at 145. Yet this export ban—which applies alike to trash generated in Clarkstown and trash originated out of state—was wholly ignored by the court below.

It is self-evident that Local Law 9, both on its face and as applied to petitioners, has a direct impact on interstate commerce. As noted earlier, the ordinance expressly provides that all non-recyclable trash finding its way into Clarkstown must be turned over to the designated facility operated by the town's contractor. Thus, on its face, the ordinance bans the export from the town of any trash that has not been first processed at the designated facility, and backs up this local monopoly with criminal sanctions. *See* Local Law 9 § 7, Pet. App. 54a.

As applied to petitioners, this ban has prohibited them from sending non-recyclable waste—which they separate from recyclable components of trash originating in other states and in other parts of New York—directly to power plants and landfills located in Ohio, Delaware, Pennsylvania, Kentucky, Indiana and Florida. Indeed, this litigation began when the town's law enforcement officials physically stopped the trucks that were hauling trash

from petitioners' facility to out-of-state destinations. Pet. App. 26a. Just as in *City of Philadelphia, Fort Gratiot,* and *Chemical Waste Management,* the interstate movement of waste materials unquestionably is directly impeded by the local law under attack.

Not only is the impact on interstate commerce of the Clarkstown ordinance no different in kind than that presented in this Court's prior cases dealing with restrictions on waste, it is equally pernicious—it is clearly motivated by the parochial "economic protectionism" that the Commerce Clause was designed to eliminate. In fact, the overtly protectionist nature of Local Law 9 presents an even more compelling case for its invalidity. In sharp contrast to the situation presented in *City of Philadelphia, Fort Gratiot,* and *Chemical Waste Management,* the waste materials here involved *do* have economic value. They are the raw material needed to supply and operate Clarkstown's designated waste facility in a cost-effective manner, and thereby eliminate the prospect of any payment by the town under its guarantee. And it is precisely for this economic reason that Clarkstown has attempted to restrict the departure of waste materials from the town. Thus, the ordinance's restriction on the export of waste materials represents no more than a naked attempt by Clarkstown to remove what has become a valuable resource from the flow of commerce in order to reserve it for the town's own economic benefit.

When the export restriction is properly viewed in this fashion, there is no question that it cannot pass muster under this Court's Commerce Clause jurisprudence. It is well established that the "virtually *per se* rule of invalidity," employed by the Court in striking down the import restrictions involved in *City of Philadelphia, Fort Gratiot,* and *Chemical Waste Management,* applies as well to export restraints. *See, e.g., South-Central Timber Dev., Inc. v. Wunnicke,* 467 U.S. 82 (1984) (restriction on export of unprocessed logs); *Hughes v. Oklahoma,* 441 U.S. 322

(1979) (restriction on export of natural minnows); *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949) (restriction on export of milk); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (restriction on export of raw and unshelled shrimp); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (restriction on export of natural gas). Indeed, this Court reiterated in *Fort Gratiot* that "the Commerce Clause prohibits states from 'advanc[ing] their own commercial interests by curtailing the movement of commerce, *either into or out of the state*.'" 112 S. Ct. at 2023 (emphasis added).

It is equally well-established that a state, consistently with the Commerce Clause, cannot give its own citizens "a preferred right of access . . . to natural resources located within its borders or to the products derived therefrom." *New England Power Co. v. New Hampshire*, 455 U.S. 331, 338 (1982); *see also Hughes v. Oklahoma, supra*. As this Court has often explained,

> These cases stand for the basic principle that a "State is without power to prevent privately owned articles of trade from being shipped and sold in interstate commerce on the ground that they are required to satisfy local demands or because they are needed by the people of the State."

City of Philadelphia, 437 U.S. at 627 (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. at 10).

Thus, for example, in *Hughes*, this Court had little difficulty in striking down a state law which forbade the transportation out of state of natural minnows in commercially significant numbers for sale, where less discriminatory measures were available to meet the state's purported conservation concerns. In so holding, the Court emphasized that the measure in question "'overtly blocks the flow of interstate commerce at [the] State's borders,'" 441 U.S. at 337,[11] and that "[s]uch facial discrimination

[11] Quoting *City of Philadelphia*, 437 U.S. at 624.

by itself may be a fatal defect, regardless of the State's purpose . . . ." *Id.* So here, Local Law 9 "overtly blocks the flow of interstate commerce" in waste at the town border, preventing such trash from going to landfills or other users of waste in other states or other cities until it has first been processed by the designated facility. *See also Foster-Fountain Packing Co. v. Haydel, supra.*

More recently, in *New England Power Co. v. New Hampshire*, the Court made clear that an export restraint overtly designed to give a state's citizens an economic advantage over their neighbors was, without more, expressly forbidden by the Commerce Clause. That case involved an order of a state power commission forbidding the sale of locally-generated hydroelectric energy outside the state. Relying on its prior decisions holding that a state could not reserve natural resources for its own citizens, this Court struck down the ban, explaining:

> The order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the States. The Commission has made clear that its order is designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states. . . . Such state-imposed burdens cannot be squared with the Commerce Clause when they serve only to advance "simple economic protectionism."

455 U.S. at 339 (quoting *City of Philadelphia*, 437 U.S. at 624).

Nor is it constitutionally significant that the Clarkstown ordinance permits the trash to be exported by the designated facility after the trash has been processed there. On the contrary, this Court has repeatedly invalidated similar local processing requirements imposed on articles of interstate trade. For example, as early as 1928, this

Court held in *Foster-Fountain Packing Co.* that a state could not prevent the export of raw or unshelled shrimp in order to require that they be packed and canned locally. *Johnson v. Haydel*, 278 U.S. 16 (1928), reached the same conclusion with respect to a similar statute pertaining to oysters. Likewise, in *Toomer v. Whitsell*, 334 U.S. 385, *reh'g denied*, 335 U.S. 837 (1948), a state law expressly requiring shrimp caught within a state's territorial waters to be unloaded, packed and stamped at a local port "before 'shipping or transporting it to another state'" was held violative of the Commerce Clause. 334 U.S. at 403. In all of these cases, the statutory scheme permitted the goods involved *eventually* to enter interstate commerce, but the statute burdened interstate commerce by requiring that the goods first be processed locally. *See also Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (holding unconstitutional a state regulatory order prohibiting a grower from shipping Arizona-grown cantaloupes out-of-state until they were packed in approved containers where such order would have required packing in Arizona).

Not surprisingly, then, in a recent statement on the subject, a four-Justice plurality indicated that "there is little question that the [local] processing requirement cannot survive scrutiny under the precedents of the Court." *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 99 (1984). *Wunnicke* involved an Alaska-imposed requirement that certain timber sold from state-owned lands be processed within Alaska before shipment out-of-state. Treating the requirement "as a naked restraint on export of unprocessed logs," the Justices easily disposed of any suggestion that the local processing requirement could be constitutionally imposed:

> Because of the protectionist nature of Alaska's local-processing requirement and the burden on commerce resulting therefrom, we conclude that it falls within the rule of virtual *per se* invalidity of laws that

> "bloc[k] the flow of interstate commerce at a State's borders."

Wunnicke, 467 U.S. at 100 (quoting *City of Philadelphia*, 437 U.S. at 624).[12] Given its clear "economic protectionist" intent and its "naked restraint on the export of unprocessed" trash, the Clarkstown ordinance likewise must fall.

Indeed, if anything, the in-state processing requirement imposed by Local 9 is an even greater restraint on interstate commerce than the laws struck down by this Court in *Foster-Fountain, Johnson, Toomer*, and *South-Central Timber Development*. In those cases the local laws were directed solely to the processing of goods that originated within the locality, prohibiting their removal until they had been locally processed. Here, Clarkstown's ordinance applies both to locally-generated trash and to trash originated in other states and other towns in New York. In fact, much of the trash handled in petitioners' recycling operation was brought into Clarkstown for the sole purpose of being separated into recyclable and non-recyclable components before going on to final destinations in other states. If a local processing requirement is invalid as to goods originating in the locality—as this Court has repeatedly held—then it is clearly invalid as applied to goods that originated in other towns and other states.

---

[12] In the process, the plurality, quoting from the Court's prior decision in *Pike*, observed that the Court

> "has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal."

Wunnicke, 467 U.S. at 100 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. at 145).

The invalidity of Local Law 9's export restraint is particularly clear in light of *City of Philadelphia*, this Court's seminal Commerce Clause decision in the waste disposal area. In that decision, the Court struck down New Jersey's ban on the importation of out-of-state waste precisely because it was designed to preserve a valuable local resource for New Jersey's own citizens—the state's limited landfill space. The fact that waste materials, and *not* this local resource itself, constituted the articles of commerce burdened by the protectionist measure there involved was irrelevant to the Court's Commerce Clause analysis. Rather, just as in the export restriction cases, New Jersey's attempt to stop the free flow of commerce between the states in order to reserve for its own citizens a limited local resource was constitutionally impermissible.

As the Court explained:

> The New Jersey law at issue in this case falls squarely within the area that the Commerce Clause puts off limits to state regulation. On its face, it imposes on out-of-state commercial interests the full burden of conserving the State's remaining landfill space. *It is true that in our previous cases the scarce natural resource was itself the article of commerce*, whereas here the scarce resource and the article of commerce are distinct. *But that difference is without consequence.* In both instances, the State has overtly moved to slow or freeze the flow of commerce for protectionist reasons. *It does not matter that the State has shut the article of commerce inside the State in one case and outside the State in the other. What is crucial is the attempt by one State to isolate itself from a problem common to many by erecting a barrier against the movement of interstate trade.*

City of Philadelphia, 437 U.S. at 628 (emphasis added).

Thus, if anything, the case for invalidating the local ordinance here involved is even more compelling than that presented in *City of Philadelphia*. If a state cannot discriminate against a legitimate article of commerce to protect its economic interest in a separate and distinct local resource, *a fortiori*, it cannot do so where, as here, the burdened article of commerce and the local resource are one and the same. Thus, *City of Philadelphia* both foreshadowed and disposes of the issue presented by this case.

B. There Is No Factor Unrelated to Economic Protectionism That Could Justify Local Law 9

This Court emphasized in *City of Philadelphia*, with specific reference to waste, that the "evil of protectionism can reside in legislative means as well as legislative ends." 437 U.S. at 626. Thus, even if Local Law 9 had in fact been motivated by some factor other than economic protectionism, this could not save it from unconstitutionality, since even "a presumably legitimate goal" cannot be pursued by the "illegitimate means of isolating the State from the national economy." *Id.* at 627. This, of course, is precisely what Local Law 9 does, and this Court need not even reach the issue of the factors that motivated its enactment.

But even if such an inquiry were required, Local Law 9 could be upheld only if it were shown to be "demonstrably justified by a valid factor unrelated to economic protectionism." *Fort Gratiot*, 112 S. Ct. at 2024 (citation omitted). The burden of justifying the discrimination is on the state or locality defending the law. *See Wyoming v. Oklahoma*, 112 S. Ct. 789, 801 (1992). No such showing has been, or could be, made.

It is clear that the driving force behind Local Law 9, like that of other flow control laws, was economic. The injunction against petitioners' operations was not based on any health, safety, or aesthetic objections to petitioners' center—which indeed is licensed by the State. Pet. App. 3a. Nor does Local Law 9 purport to address any health or safety issues involved in the transportation of trash. In enacting the enabling legislation that authorized the town to adopt Local Law 9, the state legislature

stated that its purpose was "to make these facilities [with which the town contracted] technically and economically viable." R. 376.

The town's own evidence confirmed that Local Law 9 was enacted because the financial benefit conferred by it upon the operator of the designated trash disposal facility ultimately confers a financial benefit upon the town itself. As the town supervisor explained, a contractor constructed the designated facility for the town, which has the right to purchase the facility at the end of five years for $1. Pet. App. 35a. In return, the town guaranteed the operator of the designated facility at least 120,000 tons of trash per year, and must pay it a per-ton penalty if it fails to receive the guaranteed minimum.

Operations such as petitioners', which bypass the designated facility, increase the likelihood that the guarantee might not be met—unless those operations are halted by an export ban. The supervisor explained, "By unlawfully bypassing the TOWN's transfer station, the defendants are costing the TOWN and its residents thousands of dollars daily in uncollected revenues as well as increasing the likelihood of the TOWN's failure to meet its contractual obligation to the transfer station." Charles Holbrook Aff., J.A. 11, R. 60.

Thus, despite the reference of the Appellate Division to the safety and health aspects of solid waste disposal, Pet. App. 9a, it is clear that the purported safety and health benefits of Local Law 9 derive simply from "the continued economic viability" of the town's waste facility—that is, from the town's desire not to pay under its guarantee to its contractor. Pet. App. 10a. In this respect, the situation here is essentially the same as that before the Eighth Circuit in *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381, 1389 (8th Cir. 1993), where the court observed that although the construction of the disposal facility may have been prompted by "legitimate environmental concerns, the purpose behind the Ordinances

is solely economic." *See also Sporhase v. Nebraska*, 458 U.S. 941, 957-58 (1982) (where measure discriminates against interstate commerce, state must demonstrate a "close fit" between measure and asserted local purpose).

Given that Local Law 9 constitutes economic protectionism, the inquiry ends there. This Court's cases have never permitted any further inquiry as to whether a protectionist law is "good" protectionism on account of its locally beneficial effects, and therefore beyond the reach of the Commerce Clause. On the contrary, the Court in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984) made clear that protectionism for a salutary purpose, such as "to promote a local industry," is still invalid protectionism. "If we were to accept that justification, we would have little occasion ever to find a statute unconstitutionally discriminatory." *Id.*

C. Any Legitimate Local Concern Here Can Be Met Through Non-Discriminatory Alternatives

Even if Local Law 9 could somehow be justified by a "valid factor unrelated to economic protectionism"—which it cannot—it would still be unconstitutional absent a demonstration by the town that a legitimate, non-protectionist goal "cannot be adequately served by non-discriminatory alternatives." *Fort Gratiot*, 112 S. Ct. at 2027. No such showing has been, or could be, made. To the contrary, there are a number of alternatives by which the goal of acquiring adequate trash for the designated facility could be pursued.[13]

---

[13] For purposes of this discussion, petitioners assume—contrary to fact—that there is some need for a municipal government to be involved in the construction and operation of a waste disposal facility in the first place. In reality, household and industrial waste disposal is a highly competitive, nationwide market that will be served with or without the intervention of a municipal government. *See, e.g., Solid Waste Price Index*, Solid Waste Digest, June 1993, at i-vi (national summary of current tip fees at hundreds of landfills, transfer stations, and incinerators).

The most obvious is simply for the facility to compete for trash in the marketplace. Unless there is literally no trash available—an unlikely prospect in today's throw-away society—there is no reason that the facility cannot compete for trash, on the basis of price and service, with its competitors in other localities. And if some assurance of a steady supply of trash is needed, it can be obtained through the same process as any other business—by entering into long-term contracts with either the generators of large quantities of waste or the companies that collect the waste. This is, quite simply, the way the American economy functions.

Nor is it true that a waste disposal project is impossible to finance without a flow control law. The existence of a government-guaranteed monopoly will obviously make any enterprise more attractive to investors, but that does not make flow control *necessary* to the financing of waste disposal projects. As an industry analyst has explained,

> While important, legal waste flow control is not a requirement for receiving a [Standard & Poor's bond] rating. It is not necessarily even a requirement for receiving a high rating. If a system can provide solid waste disposal at a cost level below the surrounding market, the incentive for a hauler to avoid the system is eliminated. The more competitive the rate, the higher the rating the system's debt is likely to enjoy.

Mark Ryan, *Courts Complicate Solid Waste Financings*, Standard & Poor's Creditweek Municipal, Nov. 9, 1992, at 69, 70 [hereinafter *Standard & Poor's*].

To be sure, if a facility proves unable to sustain itself by competing for customers and charging market rates for its services, the town may well find it necessary to shore up the facility's finances. But a flow control law prohibiting the export of trash except through the facility is far from the only reasonable means of doing so. This Court observed in *Chemical Waste Management* that con-

cerns about *excessive* waste entering a local facility can be addressed through nondiscriminatory means such as a per-ton fee on all waste disposed of within the state (whether from in state or out of state), a permit tax on all vehicles transporting waste, or "an evenhanded cap on the total tonnage landfilled." 112 S. Ct. at 2015. The same is true where the concern is about *insufficient* waste entering the facility. If the facility incurs a deficit in a competitive interstate market, the town can offset the deficit by, for example, increasing local taxes or imposing utility surcharges. *See Waste Recycling Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566, 1581 (M.D. Ala. 1993).

The feasibility of such an approach is confirmed by the actual experience of other local jurisdictions. For example, in Montgomery County, Maryland, the construction and operation of a new waste-to-energy plant is being financed in part by local tax assessments.[14] The plant will not need or use a flow control law prohibiting the use of facilities located elsewhere. Similarly, Palm Beach County, Florida avoids flow control with "a special assessment and a tipping fee, which allows matching of fixed costs with the assessments and results in competitive tipping fees." [15]

Given the ready availability of these non-discriminatory alternatives, which have been used successfully by other local jurisdictions, Local Law 9 plainly cannot survive scrutiny under the Commerce Clause.

---

[14] *See* Leila Fiester, *Foes Push for '94 Referendum on Waste Disposal Fees*, Washington Post, March 25, 1993, at M1.

[15] *Standard & Poor's, supra*, at 70.

III. CLARKSTOWN'S FLOW CONTROL ORDINANCE VIOLATES THE COMMERCE CLAUSE EVEN IF ITS EFFECT ON INTERSTATE COMMERCE IS REGARDED AS INCIDENTAL

Because Local Law 9 is clearly a protectionist statute that directly burdens interstate commerce, it is unnecessary to engage in the balancing that is appropriate for laws whose effect on interstate commerce is only incidental. Nevertheless, even if Local Law 9 were considered under that more lenient standard, it still could not pass muster.

The standard to be applied in balancing cases was summarized by the Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970):

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co. v. Detroit*, 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[16]

Even if Local Law 9 could somehow be regarded as an even-handed, non-protectionist effort to advance a legitimate local public interest—which it cannot—the burden on interstate commerce is clearly "excessive in relation to the putative local benefits" and "could be promoted as well with a lesser impact on interstate activities." Thus

[16] The statute before the Court in *Pike* was a discriminatory measure requiring that Arizona-grown cantaloupe be packed in the state. Although *Pike* is commonly cited for its expression of the balancing standard, quoted above, the Court actually employed the *per se* standard in striking down the statute. *See* 397 U.S. at 145.

it runs afoul of the Commerce Clause even under the more liberal balancing test applicable to laws whose burdens on interstate commerce are only incidental.

A. The Local Benefits of the Clarkstown Ordinance Are Limited

The state trial court concluded that the "legitimate local purpose of Local Law No. 9 is the regulation and control of solid waste disposal within the town of Clarkstown." Pet. App. 19a. But this confuses the purpose of constructing the new waste facility with the purpose of the export ban. As the Eighth Circuit cogently observed in response to a similar contention, "[e]ven if the [local jurisdiction] acted out of legitimate environmental concern when constructing the Plant, the purpose of the Plant is not the same as the purpose of the [flow control] Ordinances." *Waste Systems*, 985 F.2d at 1388. As discussed *supra* at pp. 25-26, the stated purpose of the enabling legislation and the testimony of the town supervisor confirm that the purpose of the export ban (as distinguished from the construction of the waste facility) was to insure the financial viability of the facility and make certain that the town would not have to pay under its guarantee.

It is that limited local interest—in avoiding a payment under the guarantee that it voluntarily provided the waste facility—against which the burden on interstate commerce would have to be weighed.

B. The Burden Imposed By Local Law 9 on Interstate Commerce Is A Heavy One

As discussed in part II-A, *supra*, Local Law 9 does not merely burden commerce, but bans certain commerce out of Clarkstown entirely. In addition to this flat prohibition, however, Local Law 9 also places various other burdens on interstate commerce. In considering these burdens, "[t]he practical effect of [Clarkstown's] statute must be evaluated not only by considering the consequences of the statute itself, but also by considering . . .

what effect would arise if not one, but many or every, [local jurisdiction] adopted similar legislation." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992) (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989)). This is particularly necessary with respect to flow control laws, which have already been authorized by over half the states in the nation.[17]

Viewed in this broader context, the burden imposed on interstate commerce by flow control laws such as Local Law 9 is apparent. First, and most obvious, they prevent trash from being sent to the most cost-effective disposal facilities, and insulate the designated facility from all price competition. Here, as noted, the fee of $81 per ton is significantly more than the $70 tipping fee previously charged by petitioners. The $11 per ton difference, which constitutes a 15% increase over the tipping fee that Carbone charged its customers, cannot be dismissed as inconsequential, as the Appellate Division sought to do. *See* Pet. App. 12a.

The price differentials resulting from flow control have also been significant elsewhere, as indicated by the following examples:

—$72 per ton at the designated facility v. $30 per ton at competitive facility. *Waste Systems*, 985 F.2d at 1387;

—$100 per ton at designated facility v. "approximately half" that at competitive facility. *J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl. Protection*, 857 F.2d 913, 916 (3d Cir. 1988);

—$37.50 per ton at designated facility v. $29.50 per ton at competitive facility. *Container Corp. of Carolina v. Mecklenburg County*, No. 92 cv-154-MU, slip op. at 4 (W.D.N.C. June 14, 1992).

[17] *See* fn. 8, *supra*.

These inflated tipping fees not only result in increased disposal costs for households and businesses, but also create an unintended incentive to engage in illegal (and environmentally hazardous) dumping. Flow control "increases the risk that waste will be disposed of improperly within the state by preventing any waste from being exported." *DeVito v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775, 784 (D.R.I.), *aff'd*, 947 F.2d 1004 (1st Cir. 1991). Given the choice between disposing of trash legally at a highly inflated price or dumping illegally, some irresponsible persons will choose the latter.

In addition to eliminating price competition, flow control eliminates competition on the basis of technological improvements. In Loudon County, Virginia, for example, an entrepreneurial farmer developed an inexpensive method for composting yard wastes. His tipping fee was $10 per ton, compared to $43 to $55 per ton for government-owned facilities in the area. Rather than welcoming his enterprise, however, the local government engaged him in a protracted legal contest, apparently to protect the revenues of government-owned landfills. *See* Logomasini, *supra*, at 65-67.

The possibility of flow control in an area will discourage new entry into the waste disposal business even in areas currently without flow control. Entrants can only be deterred by the knowledge that town officials can make a deal with one of their competitors at any time and shut them out of the market. Similarly, waste disposal companies may be reluctant to locate in smaller towns—which often have suitable sites available at lower costs—for fear that their access to the volume of trash needed to make the facility viable will be obstructed by the flow control laws of larger cities in which such trash is generated.

The effects of flow control laws are particularly pernicious where, as here, they apply to waste that originates

outside the locality, as well as to locally-generated waste. By forcing the out-of-state (or out-of-county) waste to go to the designated local facility for processing before it is permitted to exit the state, the locality can shift some of the cost of operating the facility away from its own citizens.[18] These costs have increased significantly, and will continue to increase, as a result of stricter environmental safeguards imposed on the construction and operation of the facilities, as well as other cost trends. *See* Kelly Outten, *Waste To Energy: Environmental and Local Government Concerns,* 19 U. Rich. L. Rev. 373, 375 (1985); *Interstate Transportation of Solid Waste: Hearings Before the Subcommittee on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce,* 102d Cong., 1st Sess. 317-19 (1991) (statement of Richard F. Goodstein, Divisional Vice President, National Government Affairs, Browning-Ferris Industries) [hereinafter *1991 House Hearings*]. In shifting these costs, however, flow control laws impose a burden on the citizens of other areas, who also have to deal with waste disposal problems—and who will inevitably be tempted to enact a similar law for their own benefit.

Moreover, the effects of a state or local ban on the export of trash extend beyond the solid waste industry. For example, by limiting the source availability of trash or artificially raising its price, such laws obstruct the use of solid waste as a source of energy. In this case, petitioner sent substantial volumes of its nonrecyclable waste to "resource recovery centers" in other states, which burn

[18] Judge Brieant, in the federal court decision granting petitioners a preliminary injunction against enforcement of Local Law 9, focused on the effect of the ordinance upon waste originating out of town. He held that the town could not "shift or defray the cost of disposing of local solid waste for the benefit of local residents to out-of-state persons or interests by improperly restricting competition and overtly blocking the interstate transportation of solid waste generated out of Town." Pet. App. 43a.

trash to generate electricity. R. 332. And the U.S. Environmental Protection Agency has found that flow control laws have restricted the recovery of paper for recycling. *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action* 3.D-6 (1988).

When these heavy burdens on interstate commerce are balanced against the local interest in avoiding payments under its guarantee to the designated facility, it is plain that the burden on interstate commerce is "excessive in relation to the putative local benefits." *Pike,* 397 U.S. at 142.[19] At present, some 15 million tons of municipal waste move in interstate commerce each year.[20] If flow control laws are allowed to stand, the result will be the imposition of substantial burdens on interstate movements of waste throughout the country. Local Law 9 must therefore be invalidated even if the balancing test applicable to laws having only an incidental effect on interstate commerce is applied.

[19] Even if Local Law 9 could be regarded, contrary to fact, as having some relation to health and safety, as the Appellate Division suggested (Pet. App. 9a), this would not lead to a different result. As this Court has observed, "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack. Regulations designed for that salutary purpose nevertheless may further the purpose so marginally, and interfere with commerce so substantially, as to be invalid under the Commerce Clause." *Kassel v. Consolidated Freightways Corp.,* 450 U.S. 662, 670 (1981) (plurality opinion) (*citing Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429 (1978)).

[20] *1991 House Hearings* at 81 (statement of Don R. Clay, Asst. Administrator for Solid Waste and Emergency Response, Environmental Protection Agency). At the time of these hearings, only one state in the union, Montana, had no known interstate movements of municipal waste. *Id.* at 263, 283-91 (statement of Allen Moore, President, National Solid Wastes Management Association).

C. The Putative Local Benefits Could Be Obtained By Non-Discriminatory Means

Any legitimate local interest in the financial well-being of a waste disposal facility can readily be advanced with a lesser impact on interstate commerce. Various alternatives by which a local jurisdiction can assure the financial viability of a waste facility are discussed in detail in Part II-C, *supra* at pp. 27-29. Beyond the obvious solution of competing in the marketplace and entering into long-term contracts with suppliers of waste, a locality can readily make up any deficit through increased local taxes or utility fees. The fact that such means may not be politically popular does not detract from their feasibility for purposes of Commerce Clause analysis. When the extremely heavy burden imposed on interstate commerce by flow control laws such as Local Law 9 is weighed against the reasonable and non-discriminatory alternatives available to the town, Local Law 9 plainly violates the Commerce Clause even if analyzed under the balancing test applicable to laws having only an incidental effect on interstate commerce.

When applying the balancing test, this Court has not hesitated to strike down facially neutral state and local laws that placed an excessive burden on interstate commerce. In the leading case of *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945), the Court struck down a state law forbidding passenger trains of more than fourteen cars and freight trains of more than seventy cars; although the law was not found to have a protectionist purpose, the Court found the burden it imposed on interstate train traffic violated the principle that "a state may not regulate interstate commerce so as *substantially to affect its flow* or deprive it of needed uniformity in its regulation. . . ." *Id.* at 779-80 (emphasis added). "Here examination of all the relevant factors makes it plain that the state interest is outweighed by the interest of the nation in an adequate, economical and efficient railway transportation

service, which must prevail." *Id.* at 783-84. *See also Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).

In this case, it is "plain that the [local] interest"—avoiding the need to pay under the guarantee to which it consented—"is outweighed by the interest of the nation in an adequate, economical and efficient" waste disposal service. The contrary conclusion of the Appellate Division, Pet. App. 12a, was error.

These consequences confirm that Local Law 9 falls squarely within the prohibitions of the Commerce Clause. Although flow control laws were unknown to the generation that framed and ratified the Constitution, the supporters of the Constitution well understood the incentives for political subdivisions to impose such burdens on commerce and the ingenuity with which they would attempt to do so:

> A very material object of this [Commerce Clause] was the relief of the States which import and export through other States from the improper contributions levied on them by the latter. Were these at liberty to regulate the trade between State and State, it must be foreseen that ways would be found to load the articles of import and export, during the passage through their jurisdiction, with duties which would fall on the makers of the latter and the consumers of the former. We may be assured by past experience that such a practice would be introduced by future contrivances. . . .

The Federalist No. 42 (Madison).

Local Law 9 is just such a "contrivance," and should be struck down.

CONCLUSION

For these reasons, the Court should reverse the decision and order of the Supreme Court, Appellate Division, Second Department of the State of New York.

Respectfully submitted,

BETTY JO CHRISTIAN
Counsel of Record
PAUL J. ONDRASIK, JR.
DAVID A. PRICE
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

DAVID SILVERMAN
KENNETH RESNIK
GRANIK SILVERMAN
254 South Main Street
New City, New York 10956-0370
Counsel for Petitioners

No. 92-1402

AUG 23 1993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court,
Appellate Division, Second Department
of the State of New York

BRIEF FOR RESPONDENT

WILLIAM C. BRASHARES
Counsel of Record
JENNIFER A. JOHNS
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

MURRAY N. JACOBSON
TOWN OF CLARKSTOWN
Office of the Town Attorney
10 Maple Avenue
New City, New York 10956
(914) 639-2060

RICHARD A. GLECKEL
Two Crossfield Avenue
Cumberland Bldg., Suite 305
West Nyack, New York 10994
(914) [illegible]
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - [illegible]

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a municipal ordinance requiring delivery of locally discarded garbage to a designated treatment facility impermissibly discriminates against or unduly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	8
SUMMARY OF ARGUMENT	11
ARGUMENT	16
I. THE ORDINANCE IS AN EXERCISE OF LOCAL POLICE POWER WHOSE EFFECT IS TO PRECLUDE THE ENTRY OF LOCALLY DISCARDED GARBAGE INTO COMMERCE UNTIL SHIPPED BY THE TOWN'S FACILITY	16
A. Locally Discarded Garbage Has Not Entered Commerce As Of The Time The Ordinance Has Application	16
B. The Ordinance Is In Effect A "Quarantine" Measure Which Precludes Locally Discarded Garbage From Entering Commerce	18
C. The Effect Of The Police Power Exercise Here Is To Limit The Opportunities Of Private Persons To Engage In Commerce In Locally Discarded Garbage And, As Such, Operates To Withhold This Garbage From Commerce	19
II. MANDATORY LOCAL DISPOSAL OF LOCALLY DISCARDED GARBAGE DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE	22
A. The Ordinance Does Not Discriminate On Its Face	25

TABLE OF CONTENTS—Continued

	Page
B. The Ordinance Is Not Protectionist In Purpose	27
C. The Ordinance Has No Protectionist Effect	34
III. UNDER THE "BALANCING" CRITERIA THIS COURT HAS APPLIED TO NONDISCRIMINATORY MEASURES WHICH INCIDENTALLY BURDEN COMMERCE, THE ORDINANCE SHOULD BE UPHELD	38
A. The Trial Court Correctly Found No Showing Of A Burden On Commerce Here, And, Even On The Facts Petitioners Assert As To Burden, It Would Be *De Minimis*	38
B. The Ordinance Is An Integral And Critical Part Of Clarktown's Plan To Respond To Its Own Garbage Problem And Thus Represents A Substantial Local Benefit	40
C. The "Balancing" Process Must Take Into Account The Different Roles Of Local Government And Private Waste Firms In Dealing With Garbage	47
CONCLUSION	50

TABLE OF AUTHORITIES

CASES

	Page
American Trucking Association v. Larson, 683 F.2d 787 (3rd Cir. 1982)	47
Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n, 461 U.S. 375 (1983)	46
B.F. Goodrich Co. v. Murtha, 754 F. Supp. 960 (D. Conn. 1991), *aff'd*, 958 F.2d 1192 (2d Cir. 1992)	46
Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)	15, 36
Bayside Fish Flour Co. v. Gentry, 297 U.S. 422 (1936)	17
Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888 (1988)	13, 47
Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959)	44
Brown-Forman Distillers v. New York State Liquor Authority, 476 U.S. 573 (1986)	27
C & A Carbone, Inc. v. Town of Clarkstown, 770 F. Supp. 848 (S.D.N.Y. 1991)	11
CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987)	46
California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905)	*passim*
Capital City Dairy Co. v. Ohio, 183 U.S. 238 (1902)	17
Champlin Refining Co. v. Corporation Commission of Oklahoma, 286 U.S. 210 (1932)	17
Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992)	*passim*
City of Indianapolis v. Ryan, 7 N.E.2d 974 (Ind. 1937)	28
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)	*passim*
City of Portsmouth v. McGraw, 488 N.E.2d 472 (Ohio 1986)	28
City of Sikeston v. Sisson, 249 S.W.2d 345 (Mo. 1952)	44
City of Spokane v. Carlson, 436 P.2d 454 (Wash. 1968)	28

TABLE OF AUTHORITIES—Continued

	Page
Clyde v. Broderick, 144 F.2d 348 (10th Cir. 1944)	17-18
Coe v. Town of Errol, 116 U.S. 517 (1886)	17
Dirt, Inc. v. Mobile County Commission, 739 F.2d 1562 (11th Cir. 1984)	42
Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978)	14, 36, 39
Fort Gratiot Sanitary Landfill v. Michigan Department of Natural Resources, 112 S. Ct. 2019 (1992)	24, 26-27
Gardner v. Michigan, 199 U.S. 325 (1905)	*passim*
Glenwillow Landfill, Inc. v. City of Akron, 485 F. Supp. 671 (N.D. Ohio 1979), *aff'd sub nom. Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacated*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985)	44
Guy v. Baltimore, 100 U.S. 434 (1880)	19
H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949)	18, 23, 38, 46
Harvey & Harvey, Inc. v. Delaware Solid Waste Authority, 600 F. Supp. 1369 (D. Del. 1985)	29, 33
Hodge v. Stout, 377 F. Supp. 131 (E.D. Tenn. 1974)	44
Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908)	19
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)	21
Hughes v. Oklahoma, 441 U.S. 322 (1979)	23
Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977)	23
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960)	37
Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985)	*passim*
Illinois v. General Electric Co., 683 F.2d 206 (7th Cir. 1982), *cert. denied*, 461 U.S. 961 (1983)	18, 23

TABLE OF AUTHORITIES—Continued

	Page
J. Filiberto Sanitation, Inc. v. Department of Environmental Protection, 857 F.2d 913 (3rd Cir. 1988)	31, 36, 39
Jewel Tea Co. v. Williams, 118 F.2d 202 (10th Cir. 1941)	18
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981)	33-34
Kidd v. Pearson, 128 U.S. 1 (1888)	17
L & H Sanitation v. Lake City Sanitation, 769 F.2d 517 (8th Cir. 1985)	42
Lewis v. B.T. Investment Managers, Inc., 447 U.S. 27 (1986)	26
Maine v. Taylor, 477 U.S. 131 (1986)	28, 34, 48
Marangi Brothers v. Board of Commissioners, 110 A.2d 131 (N.J. 1954)	28
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)	*passim*
New Energy Co. v. Limbach, 486 U.S. 269 (1988)	23
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)	23-24
Norfolk Southern Co. v. Oberly, 882 F.2d 388 (3rd Cir. 1987)	47
Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas, 489 U.S. 493 (1989)	46
Parker v. Brown, 317 U.S. 341 (1943)	17, 35
Pennsylvania v. West Virginia, 262 U.S. 553 (1923)	45
People v. A & C Trucking Co., 88 Misc. 2d 988, 390 N.Y.S. 987 (1977)	28
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	*passim*
Poynter v. Drevdahl, 359 F. Supp. 1137 (W.D. Mich. 1972)	45
Prostrollo v. University of South Dakota, 507 F.2d 775 (8th Cir. 1974), *cert. denied*, 421 U.S. 952 (1975)	45
Pyeatte v. Board of Regents, 102 F. Supp. 407 (W.D. Okla. 1951), *aff'd*, 342 U.S. 936 (1952)	44
Raymond Motor Transportation v. Rice, 434 U.S. 429 (1978)	33, 46

TABLE OF AUTHORITIES—Continued

	Page
Reeves, Inc. v. Stake, 447 U.S. 429 (1980)	20-21
Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)	18
Silver v. City of Los Angeles, 217 Cal. App. 2d 134, 31 Cal. Rptr. 545 (1963)	28
Sligh v. Kirkwood, 237 U.S. 52 (1914)	17, 19
South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177 (1938)	45
Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982)	19-20, 33
Sproles v. Binford, 286 U.S. 374 (1932)	45
State ex rel. Moock v. City of Cincinnati, 166 N.E. 583 (Ohio), *cert. denied*, 280 U.S. 578 (1929)	28, 42
Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I.), *aff'd*, 947 F.2d 1004 (1st Cir. 1991)	41
Strub v. Village of Deerfield, 167 N.E.2d 178 (Ill. 1960)	28
Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937)	17
Town of North Hempstead v. Village of Westbury, 182 A.D.2d 272, 588 N.Y.S.2d 293, *appeal dismissed*, 80 N.Y.2d 1023, 592 N.Y.S.2d 671 (1992)	49
Transportation Leasing Co. v. California, 21 Envtl. L. Rep. 20826 (C.D. Cal. Dec. 5, 1990)	46
Troje v. City Council of Hastings, 245 N.W.2d 596 (Minn. 1976)	28
United Sanitation Services, Inc. v. City of Tampa, 302 So. 2d 435 (Fla. Dist. Ct. App. 1974)	28
United States v. Garber, 626 F.2d 1144 (3d Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981)	18
United States v. Seven Barrels, etc. of Spray Dried Whole Egg, 141 F.2d 767 (7th Cir. 1944)	17, 22
United States v. Tobin, 576 F.2d 687 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978)	18

TABLE OF AUTHORITIES—Continued

	Page
Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth., 1993 WL 68651 (M.D. Ala. 1993)	41
Waste Syst. Corp. v. County of Martin, Minn., 784 F. Supp. 641 (D. Minn. 1992), *aff'd*, 985 F.2d 1381 (8th Cir. 1993)	41
White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983)	21
Wilson v. Commissioner of Internal Revenue, 564 F.2d 1317 (9th Cir. 1977), *cert. denied*, 439 U.S. [illegible]2 (1978)	17
Young v. Kellex Corp., 82 F. Supp. 953 (E.D. Tenn. 1948)	17, 22

CONSTITUTIONS

Federal

U.S. Const. art. 1, § 8, cl. 3	*passim*

State

N.Y. Const., art. IX, § 2(c) (10)	28

STATUTES

Federal

Comprehensive Environmental Response, Comprehension, and Liability Act, 42 U.S.C. §§ 9601-9675	46
Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 *et seq.*	*passim*

State

Holland-Gromack Law, 1991 N.Y. Laws 569	9, 35

Local

Local Laws, 1990, No. 9 of the Town of Clarkstown, New York	*passim*

LEGISLATIVE MATERIALS

H.R. Rep. No. 1491, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238	32

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

	Page
135 A.L.R. 1305 (1941)	42
Blair P. Bremberg & David C. Short, *The Quarantine Exception to the Dormant Commerce Clause Doctrine Revisited: The Importance of Proofs in Solid Waste Management Cases*, 21 N.M. L. Rev. 63 (1990)	25
Charles T. DuMars, *State Market Power and Environmental Protection: A State's Right to Exclude Garbage in Interstate Commerce*, 21 N.M. L. Rev. 37 (1990)	25
Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982)	47
Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* (1937)	21
Michael R. Harpring, Comment, *Out Like Yesterday's Garbage: Municipal Solid Waste and the Need for Congressional Action*, 40 Cath. U. L. Rev. 851 (1991)	48
Office of Solid Waste, United States Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action* (1989)	*passim*
Kelly Outten, Note, *Waste to Energy: Environmental and Local Governmental Concerns*, 19 U. Rich. L. Rev. 373 (1985)	29, 45
David Pomper, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Post-industrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. Pa. L. Rev. 1309 (1989)	48
Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091 (1986)	34, 47
Regulation and Licensing of Private Garbage or Rubbish Removal Services, 83 A.L.R. 2d 799 (1960)	42
William H. Rodgers, Jr., *A Superfund Trivia Test: A Comment on the Complexity of the Environmental Laws*, 22 Envtl. L. 417 (1992)	46

TABLE OF AUTHORITIES—Continued

	Page
Michael E. Smith, *State Discrimination Against Interstate Commerce*, 74 Cal. L. Rev. 1203 (1986)	26, 34, 37
The Solid Waste Dilemma: An Agenda for Action; Availability of a Draft Report and Announcement of Public Hearing, 53 Fed. Reg. 36,883 (1988)	32
Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988)	15, 24, 34, 47
Validity of Statutory or Municipal Regulations as to Garbage, 72 A.L.R. 520 (1931)	42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1402

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

---

BRIEF FOR RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of Local Laws, 1990, No. 9 of the Town of Clarkstown, New York ("Local Law 9") entitled "Solid Waste Transportation and Disposal," are pertinent to the resolution of this case:

Section 1. Definitions

Unless otherwise stated expressly, the following words and expressions, where used in this chapter, shall have the meanings ascribed to them by this section:

ACCEPTABLE WASTE—All residential, commercial and industrial solid waste as defined in New York State Law, and Regulations, including Construction and Demolition Debris. Acceptable Waste shall not include Hazardous Waste, Pathological Waste or sludge.

CONSTRUCTION AND DEMOLITION DEBRIS—Uncontaminated solid waste resulting from the construction, remodeling, repair and demolition of structures of roads; and uncontaminated solid waste consisting of vegetation resulting from land clearing and grubbing, utility line maintenance and seasonal and storm related cleanup. Such waste includes, but is not limited to, bricks, concrete and other masonry materials, soil, rock, wood, wall coverings, plaster, drywall, plumbing fixtures, non-asbestos insulation, roofing shingles, asphaltic pavement, electrical wiring and components containing no hazardous liquids, metals, brush grass clippings and leaves that are incidental to any of the above.

HAZARDOUS WASTE—All solid waste designated as such under the Environmental Conservation Law, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, the Resource Conservation and Recovery Act of 1976 or any other applicable law.

PATHOLOGICAL WASTE—Waste material which may be considered infectious or biohazardous, originating from hospitals, public or private medical clinics, departments or research laboratories, pharmaceutical industries, blood banks, forensic medical departments, mortuaries, veterinary facilities and other similar facilities and includes equipment, instruments, utensils, fomites, laboratory waste (including pathological specimens and fomites attendant thereto), surgical facilities, equipment, bedding and utensils (including pathological specimens and disposal fomites thereto), sharps (hypodermic needles, syringes, etc.), dialysis unit waste, animal carcasses,

offal and body parts, biological materials, (vaccines, medicines, etc.) and other similar materials, but does not include any such waste material which is determined by evidence satisfactory to the Town to have been rendered non-infectious and non-biohazardous.

PERSONS—Any individual, partnership, corporation, association, trust, business trust, joint venturer, governmental body or other entity, howsoever constituted.

UNACCEPTABLE WASTE—Hazardous Waste, Pathological Waste and sludge.

SLUDGE—Solid, semi-solid or liquid waste generated from a sewage treatment plant, wastewater treatment plant, water supply treatment plant, or air pollution control facility.

TOWN—When used herein, refers to the Town of Clarkstown.

Section 2. General Provisions

A. Intent; Purpose.

I. The intent and purpose of this chapter is to provide for the transportation and disposition of all solid waste within or generated within the Town of Clarkstown so that all acceptable solid waste generated within the Town is delivered to the Town of Clarkstown solid waste facility situate at Route 303, West Nyack, New York and such other sites, situate in the Town, as may be approved by the Town for recycling, processing or for other disposition or handling of acceptable solid waste.

II. The powers and duties enumerated in this law constitute proper town purposes intended to benefit the health, welfare and safety of Town residents. Additionally, it is hereby found that, in the exercise of control over the collection, transportation and disposal of solid waste, the Town is exercising essential and proper governmental functions.

B. Supervision and Regulation.

The Town Board hereby designates the Director of the Department of Environmental Control to be responsible for the supervision and regulation of the transportation and disposition of all acceptable waste generated within the Town of Clarkstown. The Director of Environmental Control shall be responsible for and shall supervise the Town's activities in connection with any waste collection and disposal agreements entered into between the Town and third parties and shall report to the Town Board with respect thereto.

C. Power to Adopt Rules and Regulations.

The Town Board may, after a public hearing, adopt such rules and regulations as may be necessary to effectuate the purposes of this chapter. At least seven (7) business days' prior notice of such public hearing shall be published in the official newspaper of the Town. A copy of all rules and regulations promulgated hereunder and any amendments thereto shall be filed in the office of the Town Clerk upon adoption and shall be effective as provided therein.

Section 3. Collection and Disposal of Acceptable Waste.

A. The removal, transportation and/or disposal of acceptable waste within or generated within the Town of Clarkstown shall be exclusively disposed of, controlled and regulated by the Town under this chapter and Chapter 50 and Chapter 82 of the Clarkstown Town Code, together with such rules and regulations as the Town has or may from time to time adopt.

B. All acceptable waste, as defined herein, except for construction and demolition debris, shall be removed, transported and/or disposed of only by carters licensed pursuant to the requirements of Chapter

50 of the Clarkstown Town Code and any amendments thereto. All other persons are hereby prohibited from removing, transporting or disposing of acceptable waste, except for construction and demolition debris generated within the Town of Clarkstown, and except as may be provided for herein or in the rules and regulations adopted pursuant to this chapter and/or Chapter 50 of the Clarkstown Town Code.

C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility located at Route 303, West Nyack, New York or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code, except for recyclable materials which are separated from solid waste at the point of origin or generation of such solid waste, which separated recyclable materials may be transported and delivered to facilities within the Town as aforesaid, or to sites outside the Town. As to acceptable waste brought to said recycling facilities, the unrecycled residue shall be disposed of at a solid waste facility operated by the Town of Clarkstown.

D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than the facilities or sites set forth in Paragraph "C" above.

Section 4. Disposal of Unacceptable Waste.

A. No unacceptable waste shall be delivered to the Town of Clarkstown solid waste facility situate at Route 303, West Nyack, New York or other solid waste facility operated by the Town of Clarkstown or recycling centers established by special permit pursuant to Chapter 106 of the Clarkstown Town Code by any person, including, without limitation, any licensed carter or any municipality. Failure to

comply with the provisions of this section shall be subject to the provisions with respect to such penalties and enforcement, including the suspension or revocation of licenses and the imposition of fines, in accordance with the provisions of this chapter and/or Chapter 50 of the Clarkstown Town Code and any amendments thereto. The Town Board of Clarkstown may, by resolution, provide for the disposal of sewer sludge, generated by a municipal sewer system or the Rockland County sewer district, at a disposal facility situate within the Town of Clarkstown.

B. It shall be unlawful, within the Town, to dispose of or attempt to dispose of unacceptable waste of any kind generated within the territorial limits of the Town of Clarkstown, except for sewer sludge as provided for in Section "A" above.

Section 5. Acceptable and Unacceptable Waste Generated Outside the Town of Clarkstown.

A. It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside the territorial limits of the Town of Clarkstown, except for acceptable waste disposed of at a Town operated facility, pursuant to agreement with the Town of Clarkstown and recyclables, as defined in Chapter 82 of the Clarkstown Town Code, brought to a recycling center established by special permit pursuant to Chapter 106 of the Clarkstown Town Code.

B. It shall be unlawful for any person to import acceptable waste or unacceptable waste from outside the Town of Clarkstown and dump same on any property located within the Town of Clarkstown and to proceed to sift, sort, mulch or otherwise mix the said material with dirt, water, garbage, rubbish or other substance, having the effect of concealing the contents of origin of said mixture. This provision

shall not apply to composting of acceptable waste carried out by the Town of Clarkstown.

Section 6. Fees for Disposal of Acceptable Waste at Town Operated Facilities.

There shall be separate fees established for disposal of acceptable waste at Town operated disposal facilities. The Town Board, by resolution adopted from time to time, shall fix the various fees to be collected at said facilities. The initial fees to be collected are those adopted by the Town Board on December 11, 1990 by Resolution Number 1097.

Section 7. Penalties for Offenses.

Notwithstanding any other provision of this chapter, the violation of any provision of this chapter shall be punishable by a fine of not more than one thousand dollars ($1,000.00) or by imprisonment for a period not exceeding fifteen (15) days for each offense, or by both fine and imprisonment, and each day that such violation shall be permitted to continue shall constitute a separate offense hereunder.

Section 8. Repealer; Severability.

Ordinances and local laws or parts of ordinances or local laws heretofore enacted and inconsistent with any of the terms or provisions of this chapter are hereby repealed. In the event that any portion of this chapter shall be declared invalid by a court of competent jurisdiction, such invalidity shall not be deemed to affect the remaining portions hereof.

Section 9. When Effective.

This chapter shall take effect immediately upon filing in the office of the Secretary of State.

Appendix to Petition for *Certiorari* ("Pet. App.") 48a-53a; Record ("R.") 64-70.[1]

---

[1] Although only Section 3A is at issue here, we present the entire text of the Ordinance because Petitioners and their *amici*, the Chemical Manufacturers of America, *et al.*, ("CMA"), argue that

STATEMENT OF THE CASE

Clarkstown, New York, historically provided a local facility for disposal of garbage discarded within its town limits. This service was provided from the 1950's until 1990 by a Town-owned landfill. Joint Appendix ("J.A.") 24. The landfill began to create environmental concerns in the 1980's and was the subject of litigation brought by the New York Department of Environmental Conservation ("DEC") to resolve these concerns. J.A. 25. The remedy agreed to in the consent decree ending the litigation required the Town to close the landfill and build a transfer station facility capable of receiving all waste discarded in the Town and properly processing and shipping that waste either to recycling facilities or to authorized final disposal facilities. *Id.* Although it required dependence on outside private disposal sites for the foreseeable future, the Town believed that the transfer station would enable it to ensure implementation of its overall waste reduction and removal program, which includes recycling requirements and composting facilities. J.A. 94, 102.

The Town entered into a contract with Clarkstown Recycling, Inc., which provided for that firm to build and operate the new Town facility. J.A. 27. The transfer station began receiving municipal waste in January 1991. J.A. 25. The Town based the size of the facility on its best estimate of the amount of garbage that would be generated within its limits. It determined that to finance the construction of the facility it would need to guarantee enough tonnage to the operator at an authorized "tipping" charge per ton to induce the operator to commit its

---

Section 5A creates an unlawful discrimination against imported non-Clarkstown waste. Petitioners' Brief ("Pet. Brief") 3, 23; Brief for *Amici Curiae* CMA, *et al.* 6-8. The CMA *amicus* brief misreads (or simply fails to read) the Ordinance. Section 5A's reference to out-of-state "unacceptable" waste is entirely meaningless because Sections 4A and 4B also prohibit local disposal of *any* "unacceptable" solid waste, whether originating inside or outside Clarkstown.

capital to the project. J.A. 10-11. At the expiration of the contract the Town may take over the facility for a nominal price. Pet. App. 4a.[2]

As part of its overall plan for handling and monitoring all Clarkstown waste and ensuring full local utilization of the new facility, which was also necessary to enable the Town to meet its guarantee of tonnage to the operator, the Town enacted several measures. One law specifies that this Town-designated facility would be the only transfer facility in the Town. The other, Clarkstown Local Law No. 9 ("the Ordinance"), at issue in this case, seeks to ensure that this facility will be fully utilized for its intended purpose. Pet. App. 4a-5a. The State of New York subsequently recognized Clarkstown's need to exert exclusive control over its waste flow with passage of the Holland-Gromack Law, which specifically authorizes all municipalities in Rockland County to require that all waste generated within the municipality be delivered to a designated facility.[3]

The Ordinance applies to the non-recyclable residue of solid waste, typically referred to as garbage or trash. It specifies that any garbage that is discarded within the Town limits must be delivered to the Town-designated facility. Local Law 9, Sections 3C and 3D. Waste becomes subject to the Ordinance either when it is put out by Clarkstown residents or businesses for collection or when a "recycling center" with a Town permit completes the removal of any valuable recyclable ingredients from waste and is ready to dispose of the residue. Local Law 9, Sections 3A and 3B. Any resident or business in

---

[2] The decision of the Supreme Court, Appellate Division, Second Department, of the State of New York, rendered on August 31, 1992, is reported at 182 A.D.2d 213 and 587 N.Y.S.2d 681, and is reproduced at Pet. App. 1a-15a. The decision of the court of original jurisdiction, the Supreme Court of the State of New York, County of Rockland, is unreported and is reproduced at Pet. App. 22a-33a. The opinion of that court upon reargument is unreported and is reproduced at Pet. App. 16a-21a.

[3] 1991 N.Y. Laws 569.

Clarkstown is free to remove any valuable recyclables from its own waste and to sell them anywhere. Any business in Clarkstown which has a permit to act as a "recycling center" may receive local waste or bring in waste from out of town and out of state, remove the valuable recyclable ingredients from that waste, and sell such recyclables anywhere it wishes. The Ordinance allows all "acceptable" waste to be brought to the Town's designated facility without regard to its place of origin. Local Law 9, Section 3C. Hazardous or pathological waste, whether originating in the Town or elsewhere, is not "acceptable" for delivery to the Town's facility or any other facility in the Town. Local Law 9, Sections 4 and 5. The fees, charges and other provisions of the Ordinance apply no differently to waste originating within Clarkstown than to waste originating outside the Town.

In 1987 Petitioners began to operate a facility in Clarkstown under a state permit allowing them to receive waste containing approximately ninety percent recyclable cardboard, to separate out and sell the cardboard and other recyclables and to send the residue to a final disposal site. J.A. 124. Petitioners sought a special Town permit for their operation which the Town Board denied, J.A. 68, amid citizen fears that the facility would in fact be a transfer station or a "dump" causing serious traffic, odor and other problems. J.A. 34-38. This permit denial was set aside by a local court order, and that case is pending appeal by the Town. J.A. 112-15. In 1991 the state DEC threatened to revoke Petitioners' permit upon finding that Petitioners had been handling a significantly higher percentage of non-recyclables (seven times greater) than was authorized under their state permit. J.A. 124-25. In March, 1991, when a truck hired by Petitioners collided with an overpass on the nearby Palisades Parkway, the Town discovered that Petitioners were in violation of the Ordinance in failing to bring their residues to the Town's designated disposal facility. J.A. 14-15. The Town also discovered that Petitioners were illegally using their Clarkstown facility as a transfer station and that much of the

waste Petitioners were bringing to their Clarkstown facility was being transported in violation of New Jersey solid waste laws.[4] Petitioners claimed that they had been able to dispose of their non-recyclable residues outside of Clarkstown at a price lower than that charged by the Clarkstown transfer station, which enabled them to charge a price for disposal to their customers of $11 per ton less than Clarkstown's price. Pet. App. 35a.

The Town filed suit to enjoin these violations of the Ordinance and the operation of the Petitioners' facility as a transfer station. The New York Supreme Court for Rockland County, having determined that the Ordinance was a valid exercise of the Town's police power and not in violation of the Commerce Clause of the United States Constitution, granted injunctive relief. Pet. App. 32a. New York's Appellate Division for the Second Judicial Department affirmed. Pet. App. 14a-15a. Petitioners sought review by this Court in a petition for *certiorari*, which was granted on May 24, 1993.[5]

SUMMARY OF ARGUMENT

This case deals with a municipality's efforts to dispose of a menace to its residents—garbage. Garbage smells—

---

[4] Clarkstown alleged at trial, and Carbone did not dispute, that the waste Carbone was bringing to its Clarkstown facility in violation of its New York permit was in significant part waste from Bergen County, New Jersey, which Carbone was shipping in violation of New Jersey regulations designating a particular disposal site for that waste under New Jersey's comprehensive solid waste program. Pet. App. 26a; J.A. 17-18.

[5] In a separate case, mooted by the decision of the state court, a federal district court preliminarily enjoined enforcement of the Ordinance. *C & A Carbone, Inc. v. Town of Clarkstown*, 770 F. Supp. 848, 855 (S.D.N.Y. 1991) (reproduced at Pet. App. 34a-46a). The court assumed without deciding that Clarkstown had a right to require local treatment of local waste, but believed that the application of the Ordinance to waste brought in from outside the Town presented a Commerce Clause problem. Pet. App. 43a.

improperly handled, it makes life unbearable to nearby residents. Improperly managed, it is a breeding ground for rats, public health-threatening insects and disease. Rain water which has run through improperly stored garbage picks up materials from it and pollutes streams and groundwater. In its decay, garbage emits explosive, environmentally damaging and often hazardous gases. For all these reasons its proper disposal is one of the principal challenges to municipalities. This case stripped to its core presents this question: whether a local governmental unit in performing its obligation to provide safe long term waste disposal services is empowered to require all garbage generated within its borders to be delivered to the facility it has designated as most protective of the health and safety of its residents.

The Ordinance applies solely to locally discarded garbage prior to any entry into commerce. The delivery of local garbage by private collection firms to the Town facility as required by the Ordinance, whether the garbage was originally discarded in Clarkstown or consists of the residue of garbage discarded after waste originating outside Clarkstown is deposited in the Town and sorted for recyclables, is a transaction distinct and separate from the subsequent shipment of the consolidated garbage to final disposal sites. Whether characterized as a measure establishing a physically separate local transaction, a "quarantine" of local garbage which operates to withhold it from commerce, or a limitation on the ability of private firms to participate in this portion of the local waste removal process, the Ordinance does not discriminate against or burden interstate commerce.

The Ordinance is not a protectionist measure. In contrast to state laws restricting the availability of scarce landfill capacity to out-of-state waste, which this Court struck down in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), the Ordinance contains no geographic or other classification which on its face confers any ad-

vantage or preference upon local interests. It is not discriminatory in purpose because the Town is not a "competitor" receiving an "advantage." Local garbage is not a commodity anyone is competing to buy or sell. The Town's sole "interest" is in carrying out its core police power responsibility to get rid of the community's garbage safely. Petitioners' interest is to earn revenues by shipping garbage to disposal sites. These interests are "incommensurate."[6] That the Ordinance may help the Town to succeed in its task and thereby reduce Petitioners' commercial opportunities as a business operating in Clarkstown does not demonstrate a protectionist purpose.

The absence of a protectionist purpose is most clearly evidenced by the effect of the Ordinance, which is to burden Clarkstown residents primarily, if not exclusively, with the higher costs of the Town's waste disposal program. They are willing to bear the costs of a program which the Town government believes is appropriate to implement state and local requirements for recycling and disposal of garbage; if they decide that the Town government's plan is less effective or more costly than it should be, they have the votes to change it.

For our entire history as a nation, cities and towns have been exercising broad control over garbage collection and disposal, and hundreds of court cases, including those of this Court in *California Reduction* and *Gardner*,[7] have upheld laws severely limiting or even precluding private participation in this field in deference to the core responsibility of local governments. Congress and the federal Environmental Protection Agency have repeatedly expressed this deference to local governmental responsibility to address the solid waste problem. The Clarkstown Ordinance represents a traditional exercise of that govern-

---

[6] *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring).

[7] *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905).

mental responsibility. To claim that its exercise confers an "advantage" on Clarkstown or that the Town has created an "export restraint" is to apply commercial concepts entirely inapposite to local government's responsibility to deal with garbage.

If the decision in this case turns upon application of the "balancing" process of *Pike v. Bruce Church, Inc.*,[8] we submit that however difficult it may be to weigh the competing governmental and private interests generally, it is plain on the record that Petitioners have shown such a slight burden on commerce, if any, that the legitimacy of the Town's interest and the "putative benefits" to Clarkstown residents are not drawn into issue. In any case, those benefits are well established in this record and easily outweigh any purported burden on interstate commerce.

Petitioners have no claim that interstate commerce in garbage disposal services is involved in the "balancing" here or that out-of-state disposal firms (not parties in this case) have any interest at stake because the Clarkstown transfer station sends its consolidated garbage to out-of-state disposal sites just as Petitioners do. This Court's *Exxon*[9] decision makes clear that the Commerce Clause is not violated by laws regulating the manner in which locally regulated firms engage in interstate commerce, notwithstanding a shifting of commercial opportunities.

Though they are a local Clarkstown business in terms of the application of the Ordinance, Petitioners term themselves interstate "brokers" of garbage services and complain basically of Clarkstown's choice of a waste handling program which does not reflect a "free trade" policy. They point to two of the wealthiest counties in the country whose choose to tax-subsidize their waste disposal facilities as evidence that "flow control" is unnecessary. Their allies, the Chemical Manufacturers Association ("CMA"), quite remarkably urge that the cities' "parochial financial concerns" are standing in the way of their industry's concerns for environmental safety. Brief for *Amici Curiae* CMA, *et al.* 4-5. They are fearful that these "flow control" laws will somehow reduce distant landfill capacity for smaller towns who cannot afford their own programs. These arguments run the spectrum from fanciful to outrageous. Their generous offer to take over the waste handling responsibility of local governments is just not acceptable to the public or to the local governments it elects.

[8] 397 U.S. 137 (1970).

[9] *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 127 (1978).

Nor does the Commerce Clause dictate any such transfer of responsibility. Referring to this Court's *Exxon* decision, one writer observed that "the negative implications of the commerce clause derive principally from a *political* theory of union, not from an *economic* theory of free trade. The function of the clause is to ensure national solidarity, not economic efficiency."[10] At stake in this case is the traditional role of local governments in having responsibility *and* control for garbage removal versus the interest of the private waste services sector in substituting "free trade" as a preferred system. The Court is not required here to join an economic or policy debate as to the future of garbage handling in America. It need only recognize the legitimate local governmental function in the handling of locally discarded garbage, which negates a protectionist purpose or an impermissible burden on interstate commerce.

[10] Laurence H. Tribe, *American Constitutional Law* 417 (2d ed. 1988); *see also, Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935).

ARGUMENT

I. THE ORDINANCE IS AN EXERCISE OF LOCAL POLICE POWER WHOSE EFFECT IS TO PRECLUDE THE ENTRY OF LOCALLY DISCARDED GARBAGE INTO COMMERCE UNTIL SHIPPED BY THE TOWN'S FACILITY.

This Court's Commerce Clause decisions include three closely related doctrines, any one of which calls for a threshold determination here that the subject garbage, by force of the Clarkstown Ordinance, does not enter commerce and become subject to the negative Commerce Clause until it is shipped out of the facility to final disposal sites. First, the Ordinance intervenes before locally discarded garbage enters commerce; second, the Ordinance operates as a nondiscriminatory "quarantine" of local garbage which withholds it from commerce; and, third, this exercise of the police power affects the nature of private interests that may attach to locally discarded garbage and, as such, precludes commerce in the local garbage prior to its arrival at the Town's designated facility.

A. Locally Discarded Garbage Has Not Entered Commerce As Of The Time The Ordinance Has Application.

Garbage required by the Ordinance to be brought to the Town's facility is treated as discarded or "generated" under Section 3C of the Ordinance when it is placed for collection in the generators' garbage containers or is otherwise ready for removal after sorting for recyclables. Private collection firms, operating under permits issued by the Town, are on notice by the Ordinance and the conditions of their permits that such discarded material is to be delivered to the Town transfer station. The "transaction" involved in this case is therefore the movement from the "curb" of the waste generator in the Town to the Town's designated facility.

In *Parker v. Brown*, 317 U.S. 341 (1943), the Court held that a state program restricting the volume of raisins moving from California growers to California processors did not offend the Commerce Clause, despite the direct impact on the flow of raisins to out-of-state purchasers, because the raisins had not reached interstate commerce at the point they were affected by the state measure. The Court noted its earlier decisions in which regulations affecting manufacturing and production operations were upheld though "they had the effect of preventing commerce in the regulated article." *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210 (1932); *Sligh v. Kirkwood*, 237 U.S. 52 (1914); *see Capital City Dairy Co. v. Ohio*, 183 U.S. 238, 245 (1902); *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 77 (1937); *cf. Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422 (1936). In other decisions of this Court and lower federal courts the legal separateness of an intrastate transaction prior to entry of goods into interstate commerce has been recognized.[11] These cases, and especially *Parker*, support the conclusion that the Clarkstown garbage has not entered interstate commerce at the Ordinance's point of impact, and that its travel to the Clarkstown transfer station is a wholly intrastate transaction distinct and separate from the subsequent transaction in which Clarkstown ships it to an out-of-state disposal site. As to the garbage or "residue" remaining for disposal at the Carbone facility in Clarkstown after removal of recyclable material, it has "come to rest" in terms of its previous status as out-of-state waste and now has no different character than any other garbage "generated" in Clarkstown.[12]

---

[11] *See Kidd v. Pearson*, 128 U.S. 1, 25 (1888); *Coe v. Town of Errol*, 116 U.S. 517, 528-29 (1886); *United States v. Seven Barrels, etc. of Spray Dried Whole Egg*, 141 F.2d 767, 770 (7th Cir. 1944); *Young v. Kellex Corp.*, 82 F. Supp. 953, 959 (E.D. Tenn. 1948).

[12] *Wilson v. Commissioner of Internal Revenue*, 564 F.2d 1317 (9th Cir. 1977), *cert. denied*, 439 U.S. 832 (1978); *Clyde v. Brod-*

B. The Ordinance Is In Effect A "Quarantine" Measure Which Precludes Locally Discarded Garbage From Entering Commerce.

In *Philadelphia,* 437 U.S. at 623-24, this Court rejected the argument that a state could distinguish its local waste and out-of-state waste on the basis that the latter posed a different menace than the former and should be quarantined. But in that case, and more recently in *Chemical Waste Management, Inc. v. Hunt,* 112 S. Ct. 2009, 2016-17 (1992), the Court explained that the so-called "quarantine cases" were not obsolete, but they simply did not condone discrimination. *Philadelphia,* 437 U.S. at 629; *Illinois v. General Electric Co.,* 683 F.2d 206, 214 (7th Cir. 1982), *cert. denied,* 461 U.S. 961 (1983).[13] As the Court said in *H.P. Hood & Sons v. Du Mond,* 336 U.S. 525, 535 (1949), referring to the "hoarding" cases, "when a state recognizes an article to be a subject of commerce, it cannot prohibit it from being a subject of interstate commerce." Conversely, an absolute quarantine of all articles of a particular kind—a rationally based, categorical removal of all such articles from public commerce—should be upheld under this Court's Commerce Clause decisions.

A law such as Clarkstown's is exactly that: an absolute quarantine of a disfavored object, locally discarded garbage. The "quarantine" does not keep offending articles out of the jurisdiction—given that the daily generation of

erick, 144 F.2d 348, 351 (10th Cir. 1944). *See also United States v. Garber,* 626 F.2d 1144, 1148 (3d Cir. 1980), *cert. denied,* 449 U.S. 1079 (1981); *United States v. Tobin,* 576 F.2d 687 (5th Cir.), *cert. denied,* 439 U.S. 1051 (1978); *Jewel Tea Co. v. Williams,* 118 F.2d 202, 207 (10th Cir. 1941). In *Schechter Poultry Corp. v. United States,* 295 U.S. 495, 543 (1935), this Court noted that the "mere fact that there may be a constant flow of commerce does not mean that flow continues after . . . [commingling] . . ." *Id.*

[13] "The hostility is to the thing itself, not to merely interstate shipment of the thing; and an undiscriminating hostility is at least nondiscriminatory." 683 F.2d at 214.

garbage by its residents makes that impossible—but it operates to preclude those articles from any further exposure in the Town by mandating a system of safe handling through the Town's transfer facility. Regardless of its origin, garbage discarded in Clarkstown is prohibited from any use other than delivery to the Town's designated facility. In purpose, substance and effect this is the permissible nondiscriminatory quarantine this Court recognized in *Chemical Waste,* 112 S. Ct. at 2016-17, where it quoted the following passage from *Guy v. Baltimore,* 100 U.S. 434, 443 (1880): "In the exercise of its police powers, a State may exclude from its territory, or prohibit the sale therein of any articles which, in its judgment, fairly exercised, are prejudicial to the health or which would endanger the lives or property of its people." Such an exercise of a community's "self protecting power," *Sligh v. Kirkwood,* 237 U.S. at 60, necessarily precludes the entry of such garbage into commerce during the application of the Town's law which specifies its manner of handling.

C. The Effect Of The Police Power Exercise Here Is To Limit The Opportunities Of Private Persons To Engage In Commerce In Locally Discarded Garbage And, As Such, Operates To Withhold This Garbage From Commerce.

Justice Holmes observed, in *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 357 (1908), that: "A man cannot acquire a right to property by his desire to use it in commerce among the states . . . [or] enlarge his otherwise limited and qualified right to the same end."[14] In *Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941, 953 (1982), this Court commented that the effect of state law on the nature of private interests that attach to local

[14] *Quoted in Sporhase v. Nebraska ex rel. Douglas,* 458 U.S. 941, 947 (1982). Justice Holmes added: "The limits set to property by other public interests present themselves as a branch of what is called the police power of the state." 209 U.S. at 355.

groundwater "[is] not irrelevant in the Commerce Clause inquiry," although the Court concluded that Nebraska's argument that its water was thus not an article of commerce "goes too far" in that it would "not only exempt Nebraska groundwater regulation from burden-on-commerce analysis, it would also curtail the affirmative power of Congress to implement its own policies concerning such regulation." Noting that the affirmative power of Congress to regulate commerce "may reach a good deal further than the mere negative impact of the Commerce Clause in the absence of any action by Congress," the dissent suggested that "a state may so regulate a natural resource as to preclude that resource from attaining the status of an 'article of commerce' for the purposes of the negative impact of the Commerce Clause." *Id.* at 962, 963 (Rehnquist, J., dissenting). Garbage is not a natural resource by any stretch of the term.[15] If there is such a basis to withhold a natural resource from treatment as an "article of commerce," there should be all the more reason to permit a state or local government to pursue a vital health and safety program the effect of which is to preclude garbage "from attaining the status." *Id.*

Garbage should be treated as garbage under the Commerce Clause as under any other part of the Constitution. It is entirely consistent with *Philadelphia* and related decisions for this Court to consider the particular attributes of garbage and to differentiate between garbage as such, the business of moving garbage and the value or scarcity of resources for its disposal in applying the negative Commerce Clause.[16] Garbage, itself, is not in demand by any-

[15] If *cement* is not a natural resource, *Reeves, Inc. v. Stake*, 447 U.S. 429, 443 (1980), certainly garbage is not either.

[16] While *Philadelphia* stands for the proposition that all "objects of interstate commerce merit Commerce Clause protection," the Court noted in that decision that such constitutional scrutiny will result in case-specific resolutions allowing for differential treat-

one.[17] It is "in commerce" only in the sense that a commercial need for businesses to get rid of its exists and these businesses operate in commerce. The Court's concept of "economic protectionism" should be applied to garbage in a practical manner.[18] A state or local govern-

ment of items in certain contexts. 437 U.S. at 622-23, 628-29. *Sporhase* represents one category of differential treatment. Another is reflected in the "market participant" cases, for example, which limit Commerce Clause application where the article of commerce is sold or purchased by the state that acts as a proprietor rather than as a regulator. *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429; *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Those cases also provide analogous support for recognition of the local governmental role in managing its waste disposal program and defining private commercial involvement in that process as it deems appropriate.

[17] Recyclable cardboard, paper, metals, and glass have value once removed from mixed municipal waste, but even before removal they do not come close to creating positive value in the whole. Indeed, the "value" of recyclables, while certainly relevant in the economics of separation and resale, is a secondary consideration in their removal. Primary interests consist of reducing the volume that must be landfilled or incinerated, *see* Office of Solid Waste, United States Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action* 18 (1989) (*"Agenda for Action"*), reducing the need for energy to produce virgin articles, and reducing the use of natural resources such as timber. The cost per ton of waste disposal is not going down—*i.e.*, garbage is not declining in "negative value"—as more recyclable ingredients are being recovered. The combined impact of declining landfill space, *id.* at 14, more stringent environmental standards for all types of waste disposal and the enormous cost of recycling operations themselves, continues to increase the cost of garbage disposal. *Id.* at 12. In any event, Clarkstown's ordinance, typical of those used by most cities, operates only on the post-recycled residue, which means the garbage it impacts is that having the maximum "negative value."

[18] "[P]ractical considerations, however screened by doctrine, underlie resolution of conflicts between state and national power." Felix Frankfurter, *The Commerce Clause Under Marshall, Taney and Waite* 33-34 (1937), *quoted in Hughes v. Alexandria Scrap Corp.*, 426 U.S. at 828.

ment's good faith "preemption" of private opportunities in handling garbage after it is discarded, by prescribing a method of local disposal or treatment in the interest of public health and safety, is effective to preclude private actions which would implicate commerce.[19]

If private firms claim that this limitation on their ability to engage in commerce in waste removal services infringes their constitutional rights, their focus should be on the Fourteenth Amendment Due Process and Taking Clauses, not the Commerce Clause. The rights of private garbage collectors or "brokers" under the Fourteenth Amendment to be free of such regulation or to be compensated for any ownership interest they might claim in the garbage they have collected have been addressed by this Court in *California Reduction,* 199 U.S. 306, and *Gardner,* 199 U.S. 325, and in many lower federal and state court decisions, with the consistent result that governmental control of garbage collection and/or disposal, even to the complete exclusion of private collectors from the business, has been held a proper exercise of the police power and not a taking.[20]

II. MANDATORY LOCAL DISPOSAL OF LOCALLY DISCARDED GARBAGE DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

If one assumes, *arguendo,* that garbage generated in Clarkstown enters interstate commerce when it passes from local residents to the local facility, the first issue to be considered according to this Court's Commerce

[19] Therefore, at the point of disposal, the trash "has not existed, and does not . . . exist, for purposes of trade." *Young v. Kellex Corp.,* 82 F. Supp. at 959. *Cf. United States v. Seven Barrels, etc. of Spray Dried Whole Egg,* 141 F.2d at 770 (holding that there is no interstate commerce where no one is "permitted" legally to sell or purchase" the items in question).

[20] *See, e.g., Hybud Equip. Corp. v. City of Akron,* 654 F.2d 1187, 1192 (6th Cir. 1981), *vacated,* 455 U.S. 931 (1982), *on remand,* 742 F.2d 949 (6th Cir. 1984), *cert. denied,* 471 U.S. 1004 (1985).

Clause precedent is whether the Ordinance is a measure which discriminates against interstate commerce or whether, if it affects commerce at all, it incidentally burdens commerce. The Court has expressed the "negative" Commerce Clause's pivotal concept of discrimination on many occasions and in many ways, but the consistent theme has been that it prohibits "economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." [21]

In considering whether unconstitutional discrimination exists, the Court distinguishes "between the power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage. . . ." *H.P. Hood,* 336 U.S. at 533. This is a distinction "deeply rooted in both our history and our law . . ." *Id.* In deciding on which side of the "deeply rooted" distinction a particular measure lies, the Court has looked first for facial evidence of a protectionist purpose, *Hughes v. Oklahoma,* 441 U.S. 322, 337 (1979), then to actual protectionist purpose, *New England Power Co. v. New Hampshire,* 455 U.S. 331, 339 (1982); *Hunt v. Washington State Apple Advertising Commission,* 432 U.S. 333, 352-53 (1977); *H.P. Hood,* 336 U.S. at 530-31, and finally to protectionist effects, *Philadelphia,* 437 U.S. at 626-27.

In contrast to the Petitioners' view that a stoppage of articles moving in interstate commerce, as such, constitutes unconstitutional discrimination, Pet. Brief 17-18, the Court has made clear repeatedly and recently [22] that a state or community does not discriminate by stopping or reducing the flow of *all* like articles moving in com-

[21] *New Energy Co. v. Limbach,* 486 U.S. 269, 273 (1988).

[22] *Chemical Waste,* 112 S. Ct. at 2017. *See Illinois v. General Electric Co.,* 683 F.2d at 214.

merce; rather, it is the preference of in-state interests over their competing counterparts in other states that is of critical relevance. "The nature of the burden is, constitutionally, more significant than its extent." *Pike,* 397 U.S. at 145. The principle applies equally to the withholding of articles of commerce, as the Court has shown in the so-called "hoarding" cases. Summarizing those decisions recently, the Court said, "The Commerce Clause of the Constitution . . . precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *New England Power Co.,* 455 U.S. at 338.

In applying these settled principles, the Court must consider whether garbage is by its nature a commodity which, in being directed to a facility to be treated or discarded, presents any "advantage" or "preference" in the sense of the "protectionism" this Court has embodied in the constitutional concept of discrimination. Those involved in the treatment of garbage are protected by the Commerce Clause from protectionist measures such as those in *Philadelphia,* 437 U.S. 617, and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources,* 112 S. Ct. 2019, 2026 (1992),[23] but the value of the

[23] "Of course, in *Philadelphia v. New Jersey,* the commerce in question was not trade in sewage or trash itself, but a service (waste disposal) or a resource (empty landfill space) of a different color." Tribe, *supra* note 10, at 245. In the import restraint cases it was irrelevant whether the "business arrangements" were viewed as "sales of garbage" or "purchases of transportation and disposal services" because the overall "commercial transactions" were obviously of "an interstate character." *Fort Gratiot,* 112 S. Ct. 2019. Here the "transactions" between Clarkstown and its resident garbage producers are significantly different in terms of "interstate character," the focus on garbage itself as the article in "demand" is evident, and a different constitutional context is present. At minimum it requires a fresh look at what "advantage" or "preference" means in the "protectionism" analysis. It also invites an open consideration of whether commerce is implicated at all. *See* Section I, *supra.*

landfill capacity or the need of the nonresident to have access to it does not render garbage itself a "natural resource." Nor does it require us to pretend that its producers or the local governments required to get rid of it consider it to be of any value such that they wish to have "preferred access" or any other "advantage" in respect to it or that they wish to capture for in-state interests the business of "processing" it.

A community which decides to undertake a garbage recycling and disposal program such as Clarkstown's has voted to pay an added price for environmental quality.[24] It has made a determination that competitive pressures can create incentives for environmentally damaging shortcuts, which it hopes to diffuse by mandating handling by a single disposal facility which is not subject to competitive price considerations. It has voted to accept a short-term economic disadvantage for long-term economic and environmental benefits. To say that it gains some "advantage" or "benefit" in the sense of constitutional "protectionism" by exercising this responsibility is nonsensical. To say that a less costly, environmentally less protective program in another jurisdiction is "disadvantaged" also misses the point. Garbage will always flow to the cheapest legally permissible disposal option. The Commerce Clause should not be employed to force the cheapest option on communities who want to do better.

A. The Ordinance Does Not Discriminate On Its Face.

The Clarkstown Ordinance requiring local handling of locally discarded waste is not facially discriminatory because it contains no classification of garbage or generators

[24] *See* Blair P. Bremberg & David C. Short, *The Quarantine Exception to the Dormant Commerce Clause Doctrine Revisited: The Importance of Proofs in Solid Waste Management Cases,* 21 N.M. L. Rev. 63, 85-86 (1990); Charles T. DuMars, *State Market Power and Environmental Protection: A State's Right to Exclude Garbage in Interstate Commerce,* 21 N.M. L. Rev. 37, 57 (1990).

of garbage based upon geographic origin or residency.[25] This immediately distinguishes this case from *Philadelphia*, 437 U.S. 617, *Fort Gratiot*, 112 S. Ct. 2019, and *Chemical Waste*, 112 S. Ct. 2009, and practically every other decision of this Court in which discrimination was found. The Ordinance takes no account of the origin of the garbage it applies to; the singular test of application is whether the garbage is "generated"—its owner has no economic or other use for it—and it is now ready for final disposal in some manner that will require payment for the disposal function. It has "negative value." Since the Ordinance applies only to garbage discarded within the Town limits, and has no application to garbage being transported through the Town, the measure can have no effect on garbage discarded in a neighboring town or state. The flat application of the Ordinance to all garbage discarded within the full jurisdictional limits of the Town's power makes it as evenhanded as this town or any town is capable of making any ordinance or regulation.

Nor does the Ordinance discriminate on its face by distinguishing between the Clarkstown garbage facility as a permissible recipient of locally discarded garbage and all other potential recipients. The Ordinance plainly does not distinguish between in-state and out-of-state firms, as in *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27 (1986). It would strain the meaning of "discrimination" considerably to argue that *designation* of a single permitted facility automatically establishes a geographic classification because the designated garbage facility is necessarily in one state and some potential competitive facilities are inevitably out-of-state. There is a vast difference

[25] "When a regulation is discriminatory on its face, the very terms of the regulation deal unequally with people inside and outside the state. There is no need to resort to any additional information—except perhaps matters known to practically everyone—to discern that the state has given an advantage to insiders." Michael E. Smith, *State Discrimination Against Interstate Commerce*, 74 Cal. L. Rev. 1203, 1239 (1986).

between sorting competitors along state or sub-state lines and designating an exclusive provider of service. The question of constitutional discrimination cannot be decided on the face of the Clarkstown Ordinance. The face is unclear until the overall context and purpose are disclosed, which means that, as in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981), the purpose and effect of the Clarkstown Ordinance are dispositive as to whether the Ordinance is protectionist, *i.e.*, discriminatory, or whether it is not.[26]

B. The Ordinance Is Not Protectionist In Purpose.

Petitioners contend that Clarkstown's kind of ordinance is a "new wrinkle" that cities have discovered to cash in on the waste disposal business that has come into existence as a result of the Court's striking down of discriminatory import measures.[27] This superficial appeal to the free enterprise ethic has the force of neither logic nor history. It defies logic that cities would *now* decide to enter the garbage business for profit amidst the deepening crisis of local landfills being exhausted and the vicious opposition to siting of new facilities. As this Court has recognized,[28] our national problem is not that cities and states are getting *into* the business of solving their garbage problems but that too many are unwilling to confront the political and financial difficulties of building transfer, energy recovery, composting, recycling, and other modern facilities that will contribute to an overall national solution.

[26] "[T]here is no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach. In either situation the critical consideration is the overall effect of the statute on both local and interstate activity." *Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986).

[27] Pet. Brief 13-15.

[28] *Philadelphia*, 437 U.S. 617; *Chemical Waste*, 112 S. Ct. 2009; and *Fort Gratiot*, 112 S. Ct. 2019.

Comprehensive and exclusive control by local government of the garbage disposal process is hardly a "new wrinkle." It has been a role of government throughout our nation's history, not as a commercial opportunity but as a core responsibility no less fundamental than police and fire protection.[29] "[L]iterally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection," *Hybud*, 654 F.2d at 1192, and many of them deal with the exact practices from which Petitioners seek relief here. This Court's own decisions in *California Reduction*, 199 U.S. 306, and *Gardner*, 199 U.S. 325, are illustrative of the deference of the courts to efforts of local governments to deal with this endemic public health and safety problem

[29] In this case, the New York appellate court commented on the New York precedent for deferring to the broad exercise of police power in dealing with garbage disposal.

> Local governments have long been authorized to enact laws relating to the "safety, health and well-being of persons or property" [N.Y. Const., art. IX, § 2(c)(10)] and it is well settled that the regulation of solid waste collection and disposal, a function traditionally entrusted to State and local governments[,] . . . is fundamentally related to the public health and welfare. . . . Municipalities have thus heretofore been empowered to ban dumping[,] . . . to grant exclusive franchises for the collection of disposal of waste[,] . . . and to prohibit outright the establishment of commercial and private disposal facilities. . . .

Pet. App. 9a (citations omitted). *See also, e.g., Strub v. Village of Deerfield*, 167 N.E.2d 178. 180 (Ill. 1960); *City of Indianapolis v. Ryan*, 7 N.E.2d 974, 976 (Ind. 1937); *Troje v. City Council of Hastings*, 245 N.W.2d 596, 598-99 (Minn. 1976); *Marangi Bros. v. Board of Commissioners*, 110 A.2d 131, 138-39 (N.J. 1954); *City of Portsmouth v. McGraw*, 488 N.E.2d 472, 476 (Ohio 1986); *State ex rel. Moock v. City of Cincinnati*, 166 N.E. 583 (Ohio), *cert. denied*, 280 U.S. 578 (1929); *City of Spokane v. Carlson*, 436 P.2d 454, 457 (Wash. 1968); *Silver v. City of Los Angeles*, 217 Cal. App. 2d 134, 138, 31 Cal. Rptr. 545, 548 (1963); *United Sanitation Services, Inc. v. City of Tampa*, 302 So. 2d 435, 436 (Fla. Dist. Ct. App. 1974); *People v. A & C Trucking Co.*, 88 Misc. 2d 988, 994, 390 N.Y.S. 987, 993 (1977).

by requiring that waste generated within a particular jurisdiction be disposed of at a designated facility.

At least twenty-seven states have enacted legislation authorizing local municipalities to enact "flow control" ordinances to enable them to implement their local programs and as part of the state solid waste management plans mandated by Congress in the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6901 *et seq.*[30] State and local governments' utilization of "flow control" has been of central importance in waste disposal plans for very important reasons. Facing not only its own local demands for an effective program, but also the planning and implementation requirements of state and federal law, a community can, through flow control, monitor the collection and disposal of all local garbage and assure that it is all managed properly.[31] Meeting state recycling and source reduction objectives would be hopeless if the disposition of local waste were unregulated.[32] Maintaining a dependable waste stream for high technology waste-to-energy, recycling or composting operations would be futile without public control of local waste flow.[33]

[30] Pet. Brief 14, note 8.

[31] *Cf. Agenda for Action, supra* note 17, at 14.

[32] *See Harvey & Harvey, Inc. v. Delaware Solid Waste Auth.*, 600 F. Supp. 1369, 1378-79 (D. Del. 1985) (citing general assembly findings in the Delaware Solid Waste Authority Act, which discuss the need for comprehensive state regulation of solid waste disposal in order to meet environmental goals).

[33] *See* Kelly Outten, Note, *Waste to Energy: Environmental and Local Governmental Concerns*, 19 U. Rich. L. Rev. 373, 381 (1985) ("For a waste to energy facility to be successful, there must be a guaranteed supply of waste to assure continuous energy production. It would be very difficult to obtain financing or to find a ready market for the energy produced if there was no continuity of production. The duty of guaranteeing the waste supply will usually fall upon the local government. The amount of waste supply which can be guaranteed by the local government will depend upon whether the waste is collected by the municipality or by private haulers, and in turn, upon who decides where the waste will be disposed.").

In Clarkstown's case, as with many other communities, flow control has been determined to be an essential tool also to obtain financing for a new or upgraded waste facility.[34] Some cities can use general obligation bonds for such financing, but most find them so limited legally or politically that it is not a realistic option. A few wealthy communities or counties can afford to use general tax revenues to subsidize a waste facility as needed. But for many communities the only realistic, near-term option to finance a needed garbage treatment or disposal facility is to pledge the revenues of the facility and secure those revenues by requiring full community utilization of the new facility. The added cost of better waste handling facilities is passed through to local waste generators by private haulers, but, unlike a general tax or other subsidy, the higher costs of better garbage disposal are "internalized" by specifically impacting those who make decisions about packaging and other waste generating aspects of their purchases.

Based upon the long tradition of judicial deference to the needs of local governments to limit or eliminate private participation in local waste removal as they deem appropriate, cities have often simply taken over all collection and disposal functions or created public utility or franchising structures to ensure complete control over routes, charges, disposal options, and every other aspect of private participation. Clarkstown's program, one of the least restrictive, has hoped to realize economic and service benefits of a competitive private market for waste collection and recycling services as a component of its overall plan, but not in lieu of the essential governmental control needed to make the overall program work.

Thus, the local governmental need for control of waste flow goes to the very ability of municipalities to achieve long-term solid waste solutions that have nothing at all to do with local economic protection at the expense of out-

[34] *See Memorandum in Support of Holland-Gromack Bill,* R. 376.

of-state residents and businesses. The Third Circuit's decision in *J. Filiberto Sanitation, Inc. v. Department of Environmental Protection,* 857 F.2d 913 (3rd Cir. 1988), offers an excellent example of a local government managing the variety of problems associated with garbage collection, transportation and disposal, and evidences the need for the kind of control of local waste disposal at issue here. In *Filiberto* the record contained extensive evidence that the county plan requiring the processing of trash at the county's designated transfer station served to:

> assure that all trash produced within the county is properly disposed of; reduce truck traffic on county roadways; give the county an accurate gauge for planning purposes of the amount of waste generated; allow the county to enter into and meet long- and short-term contracts for final disposal, which are typically on a put-or-pay basis; and assure that all haulers, many of whom lack equipment for long-distance hauling, have a practical outlet for trash as the distance to landfills grows.

Id. at 920. In mandating that all local waste be brought to the county's transfer station, the county sought to comply with a comprehensive statewide plan to deal with New Jersey's garbage crisis. As required under state law, the county held a public hearing and allowed written comment by the public before adopting its flow control plan. *Id.* at 915.

The concerns addressed by the county in *Filiberto* are typical of those addressed by Clarkstown in enacting and implementing its solid waste policy. The Town Board adopted Local Law 9 following preparation of a full Environmental Assessment Form ("EAF"). J.A. 25. Before selecting Clarkstown Recycling Center, Inc., the Town Board requested proposals from companies wishing to build and operate the new transfer station, and allowed public comment on the proposals. J.A. 26. Authorizing a transfer station was part of Clarkstown's comprehensive

plan to reduce the generation of solid waste within the Town. Indeed, in 1988, Clarkstown implemented a voluntary recycling program, which was supplanted by a mandatory Town recycling program in 1989. Pet. App. 28. Clarkstown also maintains two composting sites where leaves and grass clippings are accepted for compost to eventually be returned to the soil as mulch and organic fertilizer. Pet. App. 29. Clarkstown's comprehensive control over the waste flow discarded within the Town limits enables it successfully to monitor and ensure compliance with its overall solid waste plan.

The Congress and Executive branch have also repeatedly recognized the responsibility of local governments to plan for and provide environmentally sound garbage programs,[35] and, in the *Hybud* case in which a similar ordinance was sustained under the Commerce Clause and the Fourteenth Amendment,[36] the Environmental Protection Agency and Department of Energy, as *amici,* stated that "flow control" laws mandating local waste disposal to ensure the feasibility of designated local waste facilities "accord with national environmental and energy policy." *Hybud,* 654 F.2d at 1191.

---

[35] In enacting RCRA, 42 U.S.C. § 6901 *et seq.*, Congress found, "with respect to solid waste . . . that . . . the collection and disposal of solid waste should continue to be primarily the function of State, regional and local agencies . . ." 42 U.S.C. § 6901(a)(4). *See also* H.R. Rep. No. 1491, 94th Cong., 2d Sess. 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6249; 42 U.S.C. § 6948(d)(3). The Environmental Protection Agency has, upon several occasions, also expressed this deference. *See, e.g., Agenda for Action, supra* note 17, at 22, 34; *The Solid Waste Dilemma: An Agenda for Action; Availability of a Draft Report and Announcement of Public Hearing,* 53 Fed. Reg. 36,883, 36,884 (1988).

[36] On a petition for *certiorari* raising the Commerce Clause and Sherman Act issues, the Court remanded for further proceedings on the antitrust issue and denied *certiorari* following the Sixth Circuit's reaffirmance of its decision upholding the "flow control" law. *See* 471 U.S. 1004 (1985).

This history and long-settled legal precedent is not disputed by Petitioners here, just ignored. But that history, and the very nature of local government's responsibility to handle locally discarded garbage, fundamentally negate the charge of economic protectionism. The implicit purpose of Clarkstown's Ordinance plainly is not to achieve some advantage for local residents or businesses at the expense of non-local residents or businesses, which is evidenced by the nature and incidence of the Ordinance's burdens. In *Philadelphia,* out-of-state interests needing access to landfill capacity were clearly burdened, competing New Jersey users of landfill capacity were clearly benefitted, and those burdened had no ability to change the burdening measures beacuse they did not vote in New Jersey.[37] In contrast, here the Clarkstown Ordinance burdens Clarkstown residents and businesses who must pay more to take their garbage to the Clarkstown facility than they would pay if they could shop for the cheapest site available outside of Clarkstown.[38] Clarkstown's residents, of course, are those who have complete control of the political process which can repeal or change the Ordinance if it is not in the best overall interests of the Town.[39] The nature of the Town's responsibility, the rational use of the Ordinance to bear that responsibility and the placement of

---

[37] *Philadelphia,* 437 U.S. at 628. The reverse situation—and result—was seen in *Harvey & Harvey,* 600 F. Supp. at 1380. The court in *Harvey & Harvey* found it significant that the plaintiffs represented in-state rather than out-of-state economic interests because "the existence of major in-state interests affected by the Act is a powerful safeguard against legislative abuse." *Id.* at 1380 n.15 (quoting *Clover Leaf,* 449 U.S. at 473 n.17).

[38] "Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the State." *Sporhase,* 458 U.S. at 955-56.

[39] *Kassel v. Consol. Freightways Corp.,* 450 U.S. 662, 675 (1981); *Raymond Motor Transportation v. Rice,* 434 U.S. 429, 443 n.18 (1978).

the burden of the regulation primarily, if not entirely, on residents and businesses of Clarkstown, who are fully involved in the applicable political process, negate any charge that the Ordinance is protectionist in purpose. The net effect of the Ordinance is to disadvantage Clarkstown's own residents economically for the sake of their own local environment. This not not a protectionist purpose.[40]

One writer has noted that "in every case during the current era in which the Supreme Court has either characterized a state regulation as discriminatory or treated one as such, those outside the state subjected to greater burdens belonged to the same category as those inside the state advantaged by the regulation."[41] That central principle of the Court's decisions dictates the conclusion here that the Clarkstown law, which confers no economic advantage on its own citizens, and indeed assigns them the full burden of the law, does not effect an unconstitutional discrimination.

C. The Ordinance Has No Protectionist Effect.

Petitioners argue that a law requiring delivery of garbage to Respondent's facility for transfer has the effect of preventing its handling anywhere else, including out-of-state sites. They, of course, do not represent out-of-state

[40] Petitioners' attempted use of a Clarkstown official's expression of concern about the Town's loss of revenue due to the Carbone operations, Pet. Brief 26 (citing J.A. 11), deserves the same response the Court gave in *Maine v. Taylor*, 477 U.S. 131, 150 (1986): "We fully agree with the Magistrate that '[t]hese three sentences do not convert the Maine statute into an economic protectionism measure.'" The official's concern for the viability of the Clarkstown facility was plainly focused on the threat to Clarkstown's ability to continue its environmental program.

[41] Smith, *supra* note 25, at 1225-26. *See Clover Leaf*, 449 U.S. at 473 n.17; *Kassel*, 450 U.S. at 675. *See also* Tribe, *supra* note 10, at 409-10. *Cf.* Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1095 (1986).

transfer stations or disposal sites. They argue that the Carbone companies themselves, as interstate transporters or "brokers" of garbage transportation services, are the interests burdened, since their profits are affected by the required use of the Clarkstown facility. The party purportedly benefitted is the Clarkstown designated facility, because its economic viability is supported by the Ordinance. This analysis falls apart at every turn. First, the Carbone interest here is as a local Clarkstown commercial entity; it may have a desire to bring New Jersey garbage to Clarkstown and to take Clarkstown garbage to Indiana, but it is a local merchant, part of the local political process, who is precluded from competing with the Town by virtue of the Town's program for handling its garbage problem.[42]

Second, if this "burden" were cognizable in constitutional discrimination analysis, there is no counterpart "advantage" or "preference" to the Town. This Town, like all towns, just wants to get rid of the local garbage but has the responsibility to do so in an environmentally sound manner.[43] A local ordinance facilitating that program does

[42] Carbone's complaint is really in the nature of an antitrust claim, but the State of New York's Holland-Gromack Law, 1991 N.Y. Laws 569, specifically empowering the Town to restrict competition for this purpose, and the "state action" antitrust exemption expressed in *Parker v. Brown*, 317 U.S. 341, preclude that claim.

[43] In order to carry out its duties safely and efficiently, the Town needs to be able to ensure long-term stability in the management and disposal of solid waste. *See Agenda for Action, supra* note 17, at 14 ("Many existing facilities are closing either because they are filled or because their design and operation do not meet Federal or state standards for protection of human health and the environment. New facilities must be built to replace this diminishing capacity but must be environmentally sound, preserve valuable resources, and not present undue risk to human health. The incentive to build new, environmentally sound facilities and adopt better management practices may not exist in some areas because of the

not confer a "benefit" or "advantage" of the type this Court would view as indicative of a protectionist effect. "Protectionism" connotes competition. This is not a matter of competition between Clarkstown and Carbone. Clarkstown is a governmental body trying to carry out a core police power responsibility; Carbone is a private firm trying to profit from the demand for waste transportation services. The dissimilarity of their ends makes it plain that are not competitors and that Clarkstown's means do not effectuate economic protectionism.

Third, this case does not involve a conflict between in-state and out-of-state garbage disposal facilities. Clarkstown's transfer station consolidates local garbage for shipment to out-of-state landfills. There is no discriminatory effect in terms of out-of-state competitors for the disposal business (who are not parties here in any event) because the volume of garbage leaving Clarkstown is unaffected by whether the Town's or Carbone's transfer facility is involved. A state or local law regulating the manner in which goods enter commerce is not discriminatory. *Exxon*, 437 U.S. at 127-28; *Filiberto*, 857 F.2d at 921-22.

The Petitioners argue that the effect of the Clarkstown's effort is isolation, that the constitutional principle that we "sink or swim together," *Baldwin*, 294 U.S. at 523, is violated by Clarkstown's insistence upon handling garbage discarded within its borders. Petitioners have it backwards. Isolation is what happens when communities contribute to the problem of ever-increasing flows of garbage seeking ever-dwindling disposal resources and decline to contribute to a solution by ensuring proper disposal in

current practice of 'waste flight,' in which waste is shipped by truck or rail across state and county lines to areas with available capacity. If not done concurrently with long-term planning to solve the capacity problem for a region, the short-term solution of waste flight only delays the inevitable management problem in the locality shipping the waste, and hastens potential problems in the area that receives and disposes of the waste.").

new resources they create or join other communities in creating. Clarkstown's recycling and disposal program is part of a larger New York State plan to deal with their own part of the garbage problem. It is political action at the state and local levels that Congress itself has recognized as appropriate to address the need. This is not isolationist in any sense of the word. Petitioners' preferred system of unfettered interstate trash brokering is hardly a prescription for swimming together. It is their short-term "fix" that is sinking us.

If the control by Clarkstown of its locally discarded garbage could be viewed as discriminating in effect against Petitioners as "brokers" of interstate garbage transportation transactions, we submit that this effect would not establish an impermissible discrimination but would, at most, be a factor to weigh in the less rigorous inquiry under *Pike*. Professor Smith made this observation regarding the Court's treatment of discriminatory effect cases:

> If we consider this issue in the light of the reasons that the Supreme Court gives for disfavoring state discriminations, it is doubtful that all discriminations in effect are sufficiently harmful to warrant imposing a heavy burden of justification on the states. For example, discriminations solely in effect may be substantially less likely to provoke retaliation by other states than discriminations that can be discerned on the face of the regulation or that are thought to be purposeful. In the words of Justice Holmes, "even a dog distinguishes between being stumbled over and being kicked." [44]

The Clarkstown Ordinance "is a regulation of general application, designed to better the health and welfare of the community." *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448 (1960). We submit that

[44] Smith, *supra* note 25, at 1251 (quoting Oliver Wendell Holmes, *The Common Law* 3 (1881)).

the "deeply rooted" distinction Justice Jackson articulated in *H.P. Hood,* 336 U.S. at 533, plainly applies here. Facially, and in purpose and effect, this local law claims both an historical heritage and a pressing public need to be recognized as a measure "to shelter its people from menaces to their health or safety." *H.P. Hood,* 336 U.S. at 533.

III. UNDER THE "BALANCING" CRITERIA THIS COURT HAS APPLIED TO NONDISCRIMINATORY MEASURES WHICH INCIDENTALLY BURDEN COMMERCE, THE ORDINANCE SHOULD BE UPHELD.

If the Court determines that "balancing" criteria of *Pike v. Bruce Church, Inc.,* 397 U.S. 137, are applicable in this case, it will consider whether the burden imposed upon commerce is "clearly excessive in relation to the putative local benefits." *Id.* at 142. We will address first the nature and extent of the burden alleged in the record of this case, then turn to the "putative local benefits" of the Ordinance and last address the constitutional principles that ought to apply in the "balancing" process.

A. The Trial Court Correctly Found No Showing Of A Burden On Commerce Here, And, Even On The Facts Petitioners Assert As To Burden, It Would Be *De Minimis.*

The record in this case as to an alleged burden on commerce consists of Petitioners' submission that they had been receiving waste from out-of-state and that the residue of garbage remaining after any removal of recyclables (which Petitioners were and remain free to ship anywhere they wish) was over 150 tons per week. Pet. App. 26a. They stated that they had been able to dispose of this residue outside Clarkstown at a price lower than that charged by the Clarkstown transfer station, which enabled them to charge a price for disposal to their customers of $11 per ton less than Clarkstown's price. Pet. App. 35a. The "burden" they assert is that the higher cost of taking these residues to the Clarkstown designated facility made Petitioners less competitive in their efforts to attract waste in interstate markets and thereby reduced the interstate flow of waste to their Clarkstown facility. Pet. Brief 31-33.

The trial court held that Petitioners "have failed to demonstrate that Local Law #9 has any 'demonstrable effect whatsoever on the interstate flow of goods,' " quoting from *Exxon,* 437 U.S. at 126 n.16, because "[r]egardless of whether the waste is shipped from the Clarkstown transfer station or the defendants' facility, it is destined for out-of-state landfills."[45] On rehearing, stating that Petitioners had failed to establish a burden on commerce based upon their showing of the Ordinance's impact on their own operations or "the operation of out-of-state entities with whom they are doing business," Pet. App. 20a, the court held that Petitioners had failed to prove a burden on commerce "clearly excessive" in relation to the public needs served by the Clarkstown Ordinance.[46] Pet. App. 19a. Affirming, the Appellate Division concluded that the Ordinance

> imposes no special fees, taxes, prohibitions, or duties on those transporting out-of-state articles of com-

[45] Pet. App. 30a. *See also,* Pet. App. 20a ("Defendants have failed to demonstrate factually the extent to which their operation or the operation of out-of-state entities with whom they are doing business, are being affected by this local law."). The court found Clarkstown's case to be identical to that in *Filiberto,* 857 F.2d 913, where the Third Circuit affirmed a District Court determination that no excessive burden on commerce had been shown. Pet. App. 30a.

[46] The court also rejected Petitioners' Fourteenth Amendment Due Process and Taking claims, because, "the provisions of Local Law #9 of 1990 'bear a reasonable relation' to the Town's legitimate purpose in controlling and regulating solid waste disposal within the confines of the Town." Pet. App. 32a.

> merce. Rather, the local law applies evenhandedly to all solid waste processed in the town, regardless of point of origin. Moreover, were we to assume that the presently existing $11 difference between the Town tipping fee and the fee the appellants have chosen to impose has any effect on the interstate flow of solid waste, there is no evidence before us which suggests that what can have nothing more than an incidental effect on interstate commerce is impermissibly burdensome, particularly when the 'burden' is weighed against the legitimate and significant public concerns underlying the local law.[47]

Pet. App. 11a-12a (citations omitted).

The sum total of Petitioners' burden case is that its waste business based in Clarkstown has become less competitive in interstate markets because the mandatory use of the Clarkstown transfer station raises the cost of residue disposal. This is, at most, an incidental and *de minimis* burden. It cannot be considered "excessive" in relation to the Town's local interest.

B. The Ordinance Is An Integral And Critical Part Of Clarkstown's Plan To Respond To Its Own Garbage Problem And Thus Represents A Substantial Local Benefit.

The issue Petitioners raise in this case in terms of "balancing" is not whether there are significant local benefits in the creation of an environmental facility such as Clarkstown's, but whether the Ordinance, requiring use of the

---

[47] Rejecting Petitioners' Due Process claim, the appellate court addressed the argument that the Ordinance's primary motivation was to aid the Clarkstown transfer station as a competitive entity: "A concern for the continued economic viability of a solid waste management facility established pursuant to such a plan does not negate or detract from, but in fact is a part of the health, safety and environmental concerns such plan is designed to address." Pet. App. 10a (citations omitted).

facility, is a legitimate part of that program. Several lower court cases striking down similar local measures have come to their results by separating the public value of a municipal waste facility from laws mandating its full utilization.[48] This fragmentation of local government's role in managing garbage makes no legal or practical sense.

Because garbage is and has always been a nuisance rather than an article of value, there has been no private incentive to take on the full job of getting rid of it properly. Private firms are in abundance to remove the nuisance for paying customers, and there have always been resalable fragments of the waste stream one could pick up profitably. But the full job of getting all of the garbage off the streets, sidewalks, meadows, and elsewhere has always fallen to local government.[49] Recognizing that the failure or inability of cities to bear this responsibility causes intolerable health and safety problems for the general public, the courts have always respected the broadest reach of local police power in this area. Whether a city has found it best to take over the job exclusively as a public works function, to franchise or contract with private firms or to regulate competing private firms to ensure comprehensive service, the courts have consistently deferred to the cities and rejected claims by private garbage collectors under federal and state constitutions that their exclusion from the field or restrictions on their commercial opportunities offended the Due Process or Taking pro-

---

[48] *Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth.*, 1993 WL 68651 (M.D. Ala. 1993); *Waste Syst. Corp. v. County of Martin, Minn.*, 784 F. Supp. 641 (D. Minn. 1992), *aff'd*, 985 F.2d 1381 (8th Cir. 1993); *Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775 (D.R.I.), *aff'd*, 947 F.2d 1004 (1st Cir. 1991).

[49] *California Reduction*, 199 U.S. 306; *Gardner*, 199 U.S. 325; *Hybud*, 654 F.2d at 1192.

visions.[50] The requirement that local garbage be brought to the Town's designated facility is no different in purpose or effect than any of the other long-accepted methods whereby local governments control the handling of local garbage. Seeking to create a facility that does the job and ensuring that facility is used and financially supported by local residents is one bundle.

This Court's decision in *California Reduction*, 199 U.S. 306, delivered by the first Justice Harlan, upheld a San Francisco ordinance identical in purpose to Clarkstown's Ordinance, although considerably more restrictive. After reviewing in detail the history of San Francisco's garbage problem and the difficulty its government faced in choosing among varying systems and methods for a comprehensive and effective system, the Court concluded that the Town had before it

> a most difficult problem—unsolved by experience or science—as to the best or most appropriate method of protecting the public health in the matter of the disposal of the garbage, refuse, and other materials found on private premises, and in hotels, restaurants, and like places. The state, charged with the duty of safeguarding the health of its people, committed the subject to the wisdom and discretion of the board of supervisors. The conclusion it reached appears in the ordinances in question, and the courts must accept it, unless these ordinances are, in some essential particular, repugnant to the fundamental law.

Id. at 321.

---

[50] *California Reduction*, 199 U.S. 306; *L & H Sanitation v. Lake City Sanitation*, 769 F.2d 517, 522 (8th Cir. 1985); *Dirt, Inc. v. Mobile County Comm'n*, 739 F.2d 1562, 1565-66 (11th Cir. 1984); *State ex rel. Moock*, 166 N.E. 583; Annotations, *Regulation and Licensing of Private Garbage or Rubbish Removal Services*, 83 A.L.R. 2d 799 (1960); *Validity of Statutory or Municipal Regulations as to Garbage*, 72 A.L.R. 520 (1931); 135 A.L.R. 1305 (1941). *See* additional cases cited in note 29, *supra*.

California Reduction considered only the Fourteenth Amendment Due Process and Taking issues before it; no claim under the Commerce Clause had been raised. The case is nevertheless highly pertinent here. It is an excellent illustration of the long tradition of judicial deference to the efforts of local governments in dealing with the garbage problem and in limiting private participation in the field as needed. And, in the context of the "balancing" of an alleged burden upon commerce against public benefits, it addressed (in 1905, the "heyday" of Substantive Due Process)[51] the issue of whether a city has a valid purpose as to its "means" of mandatory local disposal to serve the "end" of solving the local garbage problem. *California Reduction* upheld the rational relation between a government's program to handle its garbage problem and its use of a restraint on private commercial handling of local garbage to make its program work. The Court upheld a fifty-year exclusive franchise to a private incinerator operator and a law requiring all discarded garbage, whether or not having some further use or value, to be brought to the designated incinerator. 199 U.S. at 325. This Court viewed San Francisco's plan to handle its garbage crisis by franchising an incinerator and its laws requiring community utilization of the incinerator as an inseparable and valid exercise of the City's police power. *Id.* at 321.

Just as this Court in *California Reduction* and *Gardner* deferred in applying the Fourteenth Amendment to the legislative judgments of the governments of San Francisco and Detroit, on the propriety of mandatory local garbage disposal ordinances to deal with their garbage problems, and as this Court deferred in *Clover Leaf*, 449 U.S. at 469, to the Minnesota legislature's judgment that banning non-returnable milk containers would serve the state's environmental objectives, the Court should also defer to the judgment of Clarkstown's government that

---

[51] *Hybud*, 654 F.2d at 1192.

the Ordinance is necessary and appropriate to implement its waste removal program. Clarkstown is not "required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " *Id.* at 464 (quoting *Vance v. Bradley,* 440 U.S. 93, 111 (1979)). Petitioners' suggestion that "flow control" should be rejected because it might not be the best alternative in a given case, Pet. Brief 27, is completely at odds with the constitutional standard. This Court stated in *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959): "If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid state objective."

In *Glenwillow Landfill, Inc. v. City of Akron,* 485 F. Supp. 671, 680-81 (N.D. Ohio 1979), *aff'd sub nom. Hybud Equipment Corp. v. City of Akron,* 654 F.2d 1187 (6th Cir. 1981), *vacated,* 455 U.S. 931 (1982), *on remand,* 742 F.2d 949 (6th Cir. 1984), *cert. denied,* 471 U.S. 1004 (1985), where the court did reject Commerce Clause as well as Fourteenth Amendment claims, the district court said, "the ordinance [mandating disposal at the city incinerator] cannot be separated from [the incinerator] . . . [T]he ordinance is . . . part of the city's broader scheme to dispose of waste in a safe and sanitary manner at the [incinerator]. The ordinance is a reasonable means to achieve this reasonable goal." [52]

[52] *See Hodge v. Stout,* 377 F. Supp. 131, 135 (E.D. Tenn. 1974) (court upheld municipal ordinance requiring city residents to tie into municipal sewer system based upon two legitimate goals: to protect the public health and to insure payment of bonds issued for sewer purposes); *Pyeatte v. Board of Regents,* 102 F. Supp. 407, 415-16 (W.D. Okla. 1951), *aff'd,* 342 U.S. 936 (1952) (state policy requiring students to live in University-constructed housing in order to defray construction costs is not impermissible); *City of Sikeston v. Sisson,* 249 S.W.2d 345, 346-47 (Mo. 1952) (covenant

It would be contradictory to say the least if a local law restricting private competition as a means to achieve a concededly legitimate public purpose—a law expressly provided for by state statute for this public purpose, valid under the Fourteenth Amendment, and valid under federal antitrust laws by virtue of the "state action" exemption—would not be treated as having a legitimate purpose under the negative Commerce Clause.[53] Such a contrived fragmentation of a local government's handling of its garbage problem is antithetical to the tradition of deference by the courts to these public measures. If a city can validly build an incinerator to deal with its local garbage and can validly restrict private competition, it can surely direct the flow of its local waste to a designated facility for the manner of transfer, treatment or disposal it deems appropriate. The two valid actions are part and parcel of a single valid purpose under the Commerce Clause "balancing" criteria.

Cities, groups of cities, regional authorities, and other responsible public entities must consider a wide variety of tools to deal with their garbage problems. In many circumstances it is not feasible to finance new facilities if it is uncertain whether local waste might be diverted later to a cheap landfill operating under less stringent environmental standards.[54] Mandatory local use of these local

within city ordinance to require city property owners to connect to the city's sewerage system was valid). The same issues were presented and the same conclusions reached in *Prostrollo v. University of South Dakota,* 507 F.2d 775, 779 n.6 (8th Cir. 1974), *cert. denied,* 421 U.S. 952 (1975), and *Poynter v. Drevdahl,* 359 F. Supp. 1137, 1142 (W.D. Mich. 1972).

[53] *See Pennsylvania v. West Virginia,* 262 U.S. 553, 601-02 (1923) (Holmes, J., dissenting); *South Carolina State Highway Dep't v. Barnwell Bros., Inc.,* 303 U.S. 177, 190 (1938); *Sproles v. Binford,* 286 U.S. 374 (1932).

[54] *See* Outten, *supra* note 33, at 381.

processing or disposal facilities represents a major building block in local solutions to the problem rather than relying on other communities indefinitely. This Court has often noted the heavy burden that a party must carry in challenging a nondiscriminatory health or safety measure under the *Pike* criteria.[55] The enactment of laws mandating use of public garbage facilities is a matter not just of preference but of necessity in many communities if progress toward long-term local solutions is to be made. If commerce is in fact burdened by community environmental programs such as Clarkstown's, surely this is a case where it is "of greater importance that local interests be protected than that interstate commerce be not touched." *H.P. Hood,* 336 U.S. at 567 (Frankfurter, J., dissenting). Here there is no conflict between federal and local interests; they are in complete harmony.[56] If there is some unwritten hierarchy of "putative local benefits" in

[55] *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas,* 489 U.S. 493, 525-26 (1989); *Arkansas Electric Coop. Corp. v. Arkansas Pub. Serv. Comm'n,* 461 U.S. 375, 395 (1983); *Clover Leaf,* 449 U.S. at 728-29; *Raymond Motor,* 434 U.S. at 443-44.

[56] *See supra* note 35. In light of the enormous potential exposure of municipalities to third-party liability under the Comprehensive Environmental Response, Comprehension, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, municipalities have a greater need than ever before to be able to monitor and control their own local waste flows. Municipalities that dispose of even trace amounts of household hazardous waste may be held liable for Superfund cleanup under CERCLA. *B.F. Goodrich Co. v. Murtha,* 754 F. Supp. 960 (D. Conn. 1991), *aff'd,* 958 F.2d 1192 (2d Cir. 1992); *Transportation Leasing Co. v. California,* 21 Envtl. L. Rep. 20826 (C.D. Cal. Dec. 5, 1990). Under CERCLA, any person or municipality that contributes to contamination of a designated Superfund site is liable for clean-up and recovery costs. The average clean-up cost for a Superfund site is approximately $24 million. William H. Rodgers, Jr., *A Superfund Trivia Test: A Comment on the Complexity of the Environmental Laws,* 22 Envtl. L. 417, 422 (1992).

the *Pike* balancing, few rank higher than those involved here.[57]

C. The "Balancing" Process Must Take Into Account The Different Roles Of Local Government And Private Waste Firms In Dealing With Garbage.

The "balancing" of Clarkstown's environmental interests against the Carbones' claim to freedom to pursue their business without restraint in interstate markets must take into account the larger issue of whether state and local governments and private enterprises are to be viewed under the law as co-participants and competitors or whether it is the cities' role to lead in this field and the role of private firms to meet the market demands that follow the governmental planning, building and regulating process. Obviously, if local governments are viewed under other laws and other parts of the Constitution as having the power to supplant private participation when necessary to carry out their garbage disposal programs, they and private interests cannot be treated as equal participants in the field for Commerce Clause purposes.

The circumstances of the present case offer a good illustration of the incompatibility of public and private

[57] Paraphrasing Justice Scalia's concurring opinion in *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 95-96 (1987), if the Clarkstown Ordinance "governs only its own [residents] and does not discriminate against out-of-state interests, it should survive this Court's scrutiny under the Commerce Clause, whether it promotes [more efficient or less efficient garbage disposal]. Beyond that, it is for Congress to prescribe its invalidity." The same view is expressed in *Bendix Autolite Corp.,* 486 U.S. at 897 (Scalia, J., concurring). *See also* Regan, *supra,* note 41, at 1094-95, 1099. A similar reading of the Commerce Clause is found in *Norfolk Southern Co. v. Oberly,* 882 F.2d 388, 401 (3rd Cir. 1987), and *American Trucking Ass'n v. Larson,* 683 F.2d 787, 795 (3rd Cir. 1982). *See also* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest,* 91 Yale L.J. 425, 469-72 (1982); Tribe, *supra* note 10, at 410-11.

objectives and demonstrate why the same historical deference the courts have accorded public responsibility in this field under the Fourteenth Amendment is especially fitting in the "balancing" process under *Pike*. It is undisputed here that the "commerce" alleged to be implicated in this case consists of interstate movement of garbage in violation of the laws of all three affected jurisdictions: the generating state, New Jersey; the receiving state, New York; and the receiving community, Clarkstown. New York and New Jersey are among the states facing the most serious waste disposal crises in the country,[58] and the laws being violated represent their attempts to make their comprehensive statewide recycling and waste disposal plans work. Clarkstown also is trying to carry out its local solid waste plan by ensuring that waste discarded in its community, regardless of origin, is reduced in volume to the maximum extent possible through composting and recycling and then safely directed through its transfer station to suitable disposal facilities.

Carbone, of course, is not violating any laws if they are not constitutionally valid. But, whether they are valid includes the question whether there is a federal interest in fostering private participation is this field which is of higher value than the state and local interests reflected in the programs of New York, New Jersey and Clarkstown. The Commerce Clause "does not elevate free trade above all other values." *Maine v. Taylor*, 477 U.S. at 151. If the long-respected primary responsibility of state and-local government for garbage disposal is to be shouldered by them successfully, we submit that the "free trade" advo-

---

[58] *See* Michael R. Harpring, Comment, *Out Like Yesterday's Garbage: Municipal Solid Waste and the Need for Congressional Action*, 40 Cath. U. L. Rev. 851, 852 n.4 (1991) (citing Jon R. Luoma, *Trash Can Realities*, Audobon, Mar. 1990, at 86, 88); David Pomper, *Recycling Philadelphia v. New Jersey: The Dormant Commerce Clause, Postindustrial "Natural" Resources, and the Solid Waste Crisis*, 137 U. Pa. L. Rev. 1309, 1309-10 (1989); *Agenda for Action*, *supra* note 17, at 12.

cated by the Petitioners in this case cannot be given controlling weight on the *Pike* scales.[59]

---

[59] The brief of *amici curiae* Incorporated Villages of Westbury, Mineola, *et al.*, seems to have been filed in the wrong case in the wrong court. The State of New York, responding to the seepage of waste into Long Island's water supply, banned all landfills on Long Island and enacted legislation to empower the Town of North Hempstead to enact a Town-wide flow control ordinance and establish a Solid Waste Management Authority responsible for the disposal of all solid waste in the Town. Brief for *Amici Curiae* Incorporated Villages of Westbury, Mineola, etc. ("Westbury Brief") 11-15. After Town tipping fees climbed as high as $104, many of the *amici* Villages entered into contracts to divert their waste to a cheaper private facility, prompting the Town to sue the Villages to enforce its flow control law. *Id.* at 18-21. The New York Supreme Court, Appellate Division, declared the Town flow control law constitutional and enjoined the Villages from violating it. *Town of North Hempstead v. Village of Westbury*, 182 A.D.2d 272, 588 N.Y.S.2d 293, *appeal dismissed*, 80 N.Y.2d 1023, 592 N.Y.S.2d 671 (1992). In arguing that the Clarkstown flow control ordinance violates the Commerce Clause, the *amici* make the point, wholly inapplicable to Clarkstown, that regionally administered flow control laws "severely affect the powers, responsibilities, and taxes of those other legal governments that actually collect the solid waste." Westbury Brief 38-39. Whatever the merits of their grievance with New York's apportionment of municipal power, they have nothing to do with this case other than to provide a good example of how flow control, managed by *some* governmental unit, is effective in cleaning up an environmental disaster.

CONCLUSION

The judgment of the Supreme Court, Appellate Division, Second Department of the State of New York should be affirmed.

Respectfully submitted,

WILLIAM C. BRASHARES
Counsel of Record
JENNIFER A. JOHNS
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300

MURRAY N. JACOBSON
TOWN OF CLARKSTOWN
Office of the Town Attorney
10 Maple Avenue
New City, New York 10956
(914) 639-2060

RICHARD A. GLICKEL
Two Crosfield Avenue
Centerock East—Suite 205
West Nyack, New York 10994
(914) 353-4300
Counsel for Respondent

Dated: August 23, 1993

Supreme Court, U.S.
FILED
SEP 29 1993
OFFICE OF THE CLERK

No. 92-1402

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to The Supreme Court, Appellate Division, Second Department of the State of New York

---

PETITIONERS' REPLY BRIEF

BETTY JO CHRISTIAN
Counsel of Record
PAUL J. ONDRASIK, JR.
CHARLES G. COLE
DAVID A. PRICE
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

DAVID SILVERMAN
KENNETH RESNIK
GRANIK SILVERMAN
254 South Main Street
New City, New York 10956-0370
Counsel for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
I. THE TRASH AT ISSUE HERE IS IN INTERSTATE COMMERCE	2
II. LOCAL LAW 9 IS PER SE INVALID	10
III. EVEN UNDER THE *PIKE* BALANCING TEST, APPLICATION OF LOCAL LAW 9 TO PETITIONERS' BUSINESS IS INVALID	13
IV. CONGRESS HAS NOT AUTHORIZED THIS DISCRIMINATION AGAINST INTERSTATE COMMERCE	16
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

	Page
Allenberg Cotton Co. v. Pittman, 419 U.S. 20 (1974)	6
Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935)	15
Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959)	13
California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905)	8, 10
Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992)	17
Chicago Board of Trade v. Olsen, 262 U.S. 1 (1923)	5
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)	*passim*
D.H. Holmes Co. v. McNamara, 486 U.S. 24 (1988)	7
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921)	6
Eureka Pipe Line Co. v. Hallanan, 257 U.S. 265 (1921)	6
Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S. Ct. 2019 (1992)	3
Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)	11, 12
Gardner v. Michigan, 199 U.S. 325 (1905)	8
Hourigan v. McGarry, 106 A.D.2d 845, 484 N.Y.S.2d 243 (N.Y. App. Div. 1984)	5
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)	19-20
Johnson v. Haydel, 278 U.S. 16 (1928)	11
Lemke v. Farmers' Grain Co., 258 U.S. 50 (1922)	6
Maryland v. Louisiana, 451 U.S. 725 (1981)	5
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)	7
New Energy Co. v. Limbach, 486 U.S. 269 (1988)	20
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)	9

TABLE OF AUTHORITIES—Continued

	Page
Northwest Central Pipeline Corp. v. State Corp. Commission, 489 U.S. 493 (1989)	8
Parker v. Brown, 317 U.S. 341 (1943)	6-8
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	6, 7, 11
Reeves, Inc. v. Stake, 447 U.S. 429 (1980)	19
Shafer v. Farmers Grain Co., 268 U.S. 189 (1925)	6
Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498, 144 N.E.2d 387 (N.Y. 1947)	5
South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984)	11, 17, 18
Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945)	14
Sporhase v. Nebraska, 458 U.S. 941 (1982)	17
Toomer v. Whitsell, 334 U.S. 385 (1948)	11
United States v. Garber, 626 F.2d 1144 (3d Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981)	5
United States v. Tobin, 576 F.2d 687 (5th Cir.), *cert. denied*, 439 U.S. 1051 (1978)	5
Weiss v. Garfield, 21 A.D.2d 156, 249 N.Y.S.2d 458 (N.Y. App. Div. 1964)	5
Wyoming v. Oklahoma, 112 S. Ct. 789 (1992)	17, 18

CONSTITUTION

U.S. Const. art. I, § 8, cl. 3	*passim*

STATUTES

Resource Conservation and Recovery Act, 42 U.S.C. §§ 6941-49	16-19
Solid Waste Disposal Act Amendments of 1980, 42 U.S.C. § 6948(d)(3)(C)	18
Local Laws, 1990, No. 9 of the Town of Clarkstown, New York	*passim*

LEGISLATIVE MATERIALS

H.R. 1357, 103d Cong., 1st Sess. (Mar. 16, 1993)	19
H.R. 2649, 103d Cong., 1st Sess. (July 15, 1993)	19
H.R. Rep. No. 1491, 94th Cong., 2d Sess. (1976)	18

TABLE OF AUTHORITIES—Continued

	Page
H.R. Conf. Rep. No. 902, 102d Cong., 2d Sess. (1992)	19
ADMINISTRATIVE MATERIALS	
40 C.F.R. § 256	18
43 Fed. Reg. 38,534, 38,538 (1978)	18
44 Fed. Reg. 45,066, 45,076 (1979)	18
58 Fed. Reg. 37,477-78 (1993)	19
BOOKS AND ARTICLES	
Jeff Bailey, *Up In Smoke: Fading Garbage Crisis Leaves Incinerators Competing For Trash*, Wall St. J., Aug. 11, 1993, at A1	4
Barry Meier, *Finding Gold, of a Sort, in Landfills*, N.Y. Times, Sept. 7, 1993, at 14	4
Laurence Tribe, *American Constitutional Law* (2d ed. 1988)	8

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 92-1402

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,
v.
TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to The Supreme Court, Appellate Division, Second Department of the State of New York

PETITIONERS' REPLY BRIEF

The host of legal and policy arguments advanced by Respondent and its amici ignore two crucial facts. First, the trash in this case comes from outside the regulating jurisdiction; it is *not* trash generated by local residents.[1] Second, the trash here is *not* disposed of locally; rather, it is shipped (whether by Petitioners or by Respondent's designated facility) to disposal sites outside the regulating jurisdiction and most likely out of state.[2] Thus, the local disposal of local trash simply is not in issue.

These two facts have decisive implications for analysis of this case. First, they unquestionably establish that the trash in *this* case is moving in interstate commerce. Petitioners' facility is no more than a temporary stop for

[1] Pet. Br. 5-6; Angelo Carbone Aff., J.A. 12, R. 81; Angelo Carbone Aff., J.A. 117, R. 332.

[2] Pet. Br. 6; Angelo Carbone Aff., J.A. 12-13, R. 81-82; Angelo Carbone Aff., J.A. 117, R. 332.

inspection, sorting, and packaging of trash on that interstate journey. This case thus differs entirely from the various hypotheticals posed by Respondent in which locally generated trash or sewage is collected, treated and deposited within the bounds of the regulating jurisdiction.

Second, these facts establish an interference with interstate commerce subject to the *per se* rule of *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), and this Court's local processing cases. Those cases forbid a state not only from blocking commerce at its borders, but also from conditioning export upon some form of local activity, regardless of the relative burdens on local and out-of-state entities. The Clarkstown ordinance squarely violates those prohibitions by outlawing the export of trash except when processed through the designated transfer facility, so as to generate revenues for that facility.

Third, the out-of-town destination of the trash involved in this case eliminates the various environmental rationalizations urged by Respondent. Because the trash in this case is headed out of town, whether through the designated facility or Petitioners' facility, it can have no local environmental impact in either case. Indeed, the record reflects that both facilities ship to the same out-of-state landfills.

Finally, because this case involves trash originating out of town, policy arguments based on the need for flow control to support the financing of waste disposal facilities are irrelevant. None of the numerous amicus briefs asserts that control of out-of-town waste is essential to the financing of a local facility. In any event, these policy arguments are more appropriately addressed to Congress and the Environmental Protection Agency, which are currently considering whether flow control should be authorized in specified circumstances.

I. THE TRASH AT ISSUE HERE IS IN INTERSTATE COMMERCE

Respondent initially attempts to argue that the trash involved in this case is not an "article of commerce" because trash has "negative value" and "is not in demand by anyone." Resp. Br. 20-21 & n.17. Any such argument is squarely foreclosed, however, by this Court's decisions in *Fort Gratiot* and *City of Philadelphia*. "Solid waste, even if it has no value, is an article of commerce." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019, 2023 (1992).

Taking a similar tack, some amici argue that the Commerce Clause does not apply to laws forbidding the export of trash because garbage is not a natural resource. Whether garbage is natural or not, control over the flow of garbage *is* a valuable asset. "Generators of garbage pay, often handsomely, for its removal and disposal," Prince George's County Br. 44-45. This is confirmed by the briefs of Respondent and many of the same *amici*, who vigorously argue the financial virtues of flow control for local governments.[3] Indeed, Respondent's pursuit of the interstate trash in this case belies any notion that it is without value.[4]

In fact, the financial obligations of municipal governments to privately-owned waste handling facilities have led to an inversion of the situation previously before this Court. Where states and their political subdivisions once attempted to halt or penalize the entry of trash into their jurisdictions, the needs of the new waste handling facilities have made trash a sought-after commodity. The states

---

[3] *See* Resp. Br. 30, 45-46; Ogden Projects Br. 11-13; City of Indianapolis Br. 12-13; New York State Br. 13; San Diego Br. 7-10; State of Ohio Br. 18-19.

[4] According to the town's supervisor, this action was brought because the bypassing of the designated facility was "costing the TOWN and its residents thousands of dollars daily as well as increasing the likelihood of the TOWN's failure to meet its contractual obligation to the transfer station." Affidavit of Charles Holbrook, Town Supervisor, Town of Clarkstown, J.A. 11, R. 60. Contrary to Respondent's suggestion, Resp. Br. 34 n.40, this statement does not represent simply the personal views of a single official; the affidavit was introduced *by Respondent* to support the town's request for an injunction against Petitioners.

concede that "[g]luts of disposal capacity . . . are . . . occurring." State of Ohio Br. 16.[5] Local governments have responded accordingly; New Jersey, for example, permits its trash to leave the state for the purpose of removing recyclables, but *requires* that the nonrecyclable residue be returned to the state so that local jurisdictions can reap the financial advantages of disposing of the trash. New Jersey Br. 5, 14.

City of Philadelphia and its progeny established that interstate commerce in an article is protected even where the real source of value—the capacity to dispose of it—was distinct from the article and did not cross state lines. Similarly, in this case, the intrinsic value of garbage is irrelevant, especially when local residents are deriving undisputed financial benefits from diverting its flow.

Respondent next seeks to escape Commerce Clause scrutiny on the ground that Local Law 9 "intervenes before locally discarded garbage enters commerce," *i.e.*, that the trash does not enter commerce "until it is shipped out of the [designated] facility to final disposal sites." Resp. Br. 16. This effort to characterize the nonrecyclable trash shipped by Petitioners as "locally discarded garbage" ignores settled Commerce Clause principles in three respects.

First, the trash at issue here entered interstate commerce even before it reached Petitioners' facility, because it was shipped from sources outside the town. J.A. 117, R. 332.[6] Goods do not "come to rest" and lose their

[5] *See also* Jeff Bailey, *Up In Smoke: Fading Garbage Crisis Leaves Incinerators Competing For Trash*, Wall St. J., Aug. 11, 1993, at A1; Barry Meier, *Finding Gold, of a Sort, in Landfills*, N.Y. Times, Sept. 7, 1993, at 14.

[6] While Petitioners contend that all of the trash processed by their facility originated outside the town, Respondent has alleged that Clarkstown trash was present in some of the loads departing Petitioners' facility. Pet. App. 6a. Should this case proceed to trial, Petitioners will show that any Clarkstown trash identified by Respondent was a result of the fact that the waste was dumped and inspected by town officials at the town's facility, where it was commingled with Clarkstown trash. Angelo Carbone Aff., J.A. 119-20, R. 334-35. For purposes of this Court's review, because this case was decided below on the town's motion for summary judgment, Pet. App. 7a, Petitioners are entitled to have these disputed facts viewed in their favor. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498, 144 N.E.2d 387 (N.Y. 1947); *Hourigan v. McGarry*, 106 A.D.2d 845, 484 N.Y.S.2d 243 (N.Y. App. Div. 1984); *Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (N.Y. App. Div. 1964).

Although Respondent now maintains that this case involves only § 3 of Local Law 9, dealing with trash generated in Clarkstown, Resp. Br. 7 n.1, Petitioners were in fact charged with violating not only § 3(C) ("waste generated within the territorial limits of the Town") and § 3(D) ("waste generated or collected within the Town"), but also § 5(A) ("waste of any kind generated or collected outside the territorial limits of the Town"). Amended Verified Compl., R. 395. The trial court treated this case as involving both § 3 and § 5. Pet. App. 27a.

interstate character merely because they are held briefly for sorting and baling before continuing on to out-of-state destinations.[7] Indeed Respondent's own cases confirm that a temporary delay in an interstate movement will not change its character.[8]

Second, even trash actually generated in Clarkstown is entitled to the protection of the Commerce Clause. This Court has long held that the local acquisition of articles

[7] *Maryland v. Louisiana*, 451 U.S. 725, 729, 754-55 (1981) (natural gas halted for processing does not lose interstate character); *Chicago Board of Trade v. Olsen*, 262 U.S. 1, 33 (1923) (grain temporarily in warehouse for inspection, weighing, grading and mixing did not lose interstate character).

[8] *E.g.*, *United States v. Tobin*, 576 F.2d 687, 693 (5th Cir.) (two-year interruption of movement of stolen goods did not destroy their interstate character), *cert. denied*, 439 U.S. 1051 (1978); *United States v. Garber*, 626 F.2d 1144, 1148 (3d Cir. 1980) ("[d]elays enroute do not deprive shipments of continued characterization as interstate or foreign so long as the goods have not yet reached their destination. . . ."), *cert. denied*, 449 U.S. 1079 (1981).

for interstate shipment constitutes interstate commerce.[9] Moreover, where articles are acquired and then sorted locally to determine their final destination, the entire process is part of an interstate movement and protected from state interference. *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20, 30 (1974).[10] Because Clarkstown no longer has a landfill, J.A. 9, R. 58, trash collected in the town is destined from the outset for another state and is thus in interstate commerce.

Third, Respondent's argument—that local processing may be required as long as it is imposed prior to actual shipment—is directly contrary to established Commerce Clause jurisprudence. In *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 141 (1970), the state had argued that "all that will be regulated will be the intrastate packing of goods destined for interstate commerce." 397 U.S. at 140. But the Court concluded, "If the appellant's theory were correct, then statutes expressly requiring that certain kinds of processing be done in the home State before shipment to a sister State would be immune from constitutional challenge." *Id.* at 141. Respondent's regulation cannot evade Commerce Clause scrutiny based on a similarly flawed argument.

Parker v. Brown, 317 U.S. 341 (1943), upon which Respondent primarily relies, does not require a different result. The *Parker* Court reasoned that the regulation

[9] *Shafer v. Farmers Grain Co.*, 268 U.S. 189, 198-99 (1925) (purchase of grain in-state for shipment out-of-state is interstate commerce); *Lemke v. Farmers' Grain Co.*, 258 U.S. 50, 54-55 (1922) (same); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 290-92 (1921) (purchase of wheat in-state for shipment out-of-state is interstate commerce); *Eureka Pipe Line Co. v. Hallanan*, 257 U.S. 265, 272 (1921) (transmission of stream of oil is interstate commerce from beginning of flow).

[10] In *Allenberg*, the Court held that purchase, delivery to a local warehouse, and sorting and classification of cotton so that its destination could be determined were all a part of interstate commerce such that the purchaser did not need a license to do such business in the state. 419 U.S. at 19.

in that case controlled the disposition of the goods prior to their sale, processing and packing for interstate shipment. Here, by contrast, the ordinance controls the disposition of Petitioners' trash only *after* it has been processed and baled and the nonrecyclable residue is "ready for shipment in interstate commerce." 317 U.S. at 361. Moreover, unlike the locally grown raisins in *Parker*, the "goods" here originated in other states or towns and had already begun their movement in commerce prior to their arrival in Clarkstown.

In any event, the "mechanical test" applied in *Parker* to determine whether an article was in commerce—which involved a rigid distinction between "commerce" and "manufacture"—was an anachronism even in its own time[11] and has not been applied in subsequent cases.[12] The *Parker* Court itself observed that "courts are not confined to so mechanical a test" and relied heavily on other grounds. 317 U.S. at 362. More recent cases have limited *Parker*'s Commerce Clause holding to its unique factual context.[13]

[11] *Parker* itself noted that its mechanical, temporal distinction between local manufacture and interstate commerce had "sometimes" been applied. In fact, with respect to the reach of federal authority, the Court had already begun its assault on the principle that "manufacturing in itself is not commerce." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 34 (1937). And the cases on which *Parker* relied, which found some form of "manufacture" rather than "commerce" in order to permit state taxation, have become obsolete since the Court "abandoned the abstract notion that interstate commerce 'itself' cannot be taxed by the States." *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30 (1988).

[12] For example, in *Allenberg*, the dissent argued that the Court had ignored *Parker* in ruling that the sorting of goods in the warehouse was an aspect of interstate commerce. *See* 419 U.S. at 35-36 (Rehnquist, J., dissenting). *See also Pike*, 397 U.S. at 141 (rejecting approach similar to *Parker* and recharacterizing the cases on which *Parker* relied).

[13] The Court in *Parker* had concluded that the problems of the raisin industry (which existed solely in California) were too local in nature to be addressed by Congress and that the California

The local monopoly cases cited by Respondent and amici are also inapposite.[14] Those cases merely uphold the validity of local regulations granting or creating monopolies with respect to public services for local residents, such as sewage disposal, that are accomplished wholly within the jurisdiction. None of those cases implicates, as this one does, the free flow of interstate commerce.

The progenitor of those cases was this Court's decision in *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905), in which San Francisco had granted one company an exclusive right to destroy by cremation such items as house refuse, bones, sludge, dead animals, and putrid vegetables, fish or flesh. Businesses and households were not permitted to dispose of these items other than through the incinerator, which was in turn required to cremate them within 24 hours. In 1905, there was no prospect that any of these articles would be transported out of state and there was no challenge based on Commerce Clause grounds. The Court simply rejected, on public health grounds, a challenge based on the theory that the mandatory incineration of refuse constituted a taking without compensation under the Fourteenth Amendment. *Accord, Gardner v. Michigan*, 199 U.S. 325 (1905).

The local monopoly cases cited by Respondent and its amici are similarly limited. For example, the cases mandating a local sewage connection do not implicate inter-

program was fully consistent with federal legislation authorizing the Secretary to issue marketing orders of the same type the state had issued and to cooperate in formulating and funding locally based programs. 317 U.S. at 362-68. *Parker* has since been explained as a case based on this congruity of federal and state legislation. *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 524 (1989). *See generally* Laurence Tribe, *American Constitutional Law* § 6-26, at 491 (2d ed. 1988).

[14] *See* Resp. Br. 22; Prince George's County Br. 29-37; State of Ohio Br. 4-6; County of San Diego Br. 19-21.

state commerce and none mentions the Commerce Clause. Similarly, none of the cited local monopoly cases relating to electricity or slaughterhouses involved a Commerce Clause challenge.[15] Until the recent cases dealing with flow control, none of the cases relating to solid waste disposal monopolies addressed waste that originated or was disposed of out-of-state.

This case is fundamentally different, because the waste did not originate in Clarkstown, and was not disposed of there.[16] Respondent is instead attempting to divert an incoming stream of interstate waste to its facility, so as to gain an economic benefit. Moreover, Respondent does not dispose of that waste (or its locally-generated waste) within its own borders, but instead ships it to out-of-state landfills. Whatever may be the rule with respect to jurisdictions that merely collect local waste and dispose of it locally, interstate commerce is clearly implicated where a jurisdiction chooses to divert waste originating elsewhere, mandate (and charge for) local processing at a privately owned transfer facility, and ship it to locations in other states for disposal. When a locality chooses to rely on the interstate market as a source of waste, a means

[15] The more analogous scenario is that of a state attempting to prevent a local electric utility from exporting electricity, a restriction that this Court has held invalid under the Commerce Clause. *See New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982).

[16] Of the twenty-seven states that have enacted enabling legislation for flow control laws, fourteen explicitly limit the scope of the laws to locally-generated waste: Colorado, Connecticut, Florida, Illinois, Indiana, Maine, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, Tennessee, Washington, West Virginia. *See* Pet. Br. 14 n.8; *see also* New Jersey Br. 5, 9, 14 ("Local waste flow laws . . . direct only locally generated waste."); Springfield, Missouri Br. 13-14 & n.7 ("The *only* waste typically affected is the trash generated by local citizens. . . . Flow control, of course, does not purport to affect the actions of citizens—or their trash—from any other jurisdiction.").

of disposition, or both, it must comply with the requirements of the Commerce Clause protecting that market.[17]

II. LOCAL LAW 9 IS PER SE INVALID

As indicated in our opening brief, this Court's decision in *City of Philadelphia* makes clear that both trash import bans and trash export bans are virtually *per se* invalid under the Commerce Clause. A state "cannot overtly block[] the flow of interstate commerce at a State's borders." 417 U.S. at 624. It makes no difference whether "the article of commerce [is shut] inside the State in one case and outside the State in the other." *Id.* at 628. Thus, Respondent's statement that Local Law 9 "takes no account of the origin of the garbage," Resp. Br. 26, is immaterial; Local Law 9 clearly bans the export of trash without local processing, and thus directly restrains the flow of interstate commerce. Pet. Br. 16-25.

Respondent attempts to avoid this rule of virtual *per se* invalidity by pointing to the burden Local Law 9 imposes on local residents, by asserting the existence of an environmental purpose rather than a commercial purpose, and by characterizing Local Law 9 as a "quarantine" of

---

[17] Indeed, the County of Rockland, in which Clarkstown is located, draws a distinction between "local garbage sitting at a curb, or being trucked to the local landfill" and "garbage in a truck destined for a distant landfill or waste to energy plant," and argues:

> It is the failure or inability of the local government to manage the waste, necessitating the interstate movement of the waste, which creates the "commerce" protected by the Commerce Clause. The interstate garbage market is available to grapple with the unmanaged waste for a fee. However, if the waste can be eliminated at the source, or managed locally, through incineration, recycling, composting or the like, then the need for an interstate transaction never arises, and the solid waste never becomes an object of interstate trade.

County of Rockland Br. 21-22; *see also id.* at 28 (discussing *California Reduction*); New York Br. 28 n.15 (distinguishing between application of Local Law 9 to trash originating within the town and outside the town).

trash. Resp. Br. 18-19, 25-38. Each of these factors, however, was also urged upon the Court in *City of Philadelphia*. The New Jersey law in *City of Philadelphia* imposed a burden on local businessmen—New Jersey landfill operators—who joined in the challenge to the law. 437 U.S. at 619. The New Jersey law was supported by legislative and state court findings of an environmental purpose. *Id.* at 625. The state denied that "'New Jersey commercial interests stand to gain advantage over competitors from outside the state. . . .'" *Id.* at 626 (quoting Brief of the State of New Jersey). And the state sought to justify the import ban as a "health-protective" quarantine measure. *Id.* at 628-29. Respondent's attempt to avoid the virtual *per se* rule of invalidity is thus based on the very arguments that this Court in *City of Philadelphia* considered and rejected.

Moreover, as explained in our opening brief, Local Law 9 is also plainly invalid under a solid line of decisions of this Court striking down local processing laws. Pet. Br. 18-23.[18] Those decisions establish that a state or local jurisdiction cannot prohibit the export of goods unless they are first subject to processing in the local jurisdiction. Respondent does not even address those decisions in its brief, although they are directly in point.[19]

The circumstances of this case are, in fact, even more offensive to Commerce Clause principles than those in-

---

[18] Those decisions include *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984); *Pike*, 397 U.S. 137; *Toomer v. Whitsell*, 334 U.S. 385, 403-06 (1948); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928); and *Johnson v. Haydel*, 278 U.S. 16 (1928).

[19] Several *amici* seek to distinguish this Court's local processing cases on the basis of the alleged environmental or governmental goals of flow control. But the fact that "the State is pursuing a clearly legitimate local interest" has never been deemed a justification for a local processing requirement. *South-Central Timber*, 467 U.S. at 100 (quoting *Pike*, 397 U.S. at 143). Any genuine environmental or health and safety concern can be achieved through nondiscriminatory alternatives.

volved in the Court's prior local processing decisions. Here, the articles of commerce did not even originate within the local jurisdiction. Moreover, Local Law 9 requires not only local processing, but *duplicate* local processing; after the non-recyclable trash has been sorted and baled at Petitioner's facility, it must be brought to the town's designated transfer station for similar processing. And here, unlike the earlier local processing cases, the town derives a direct financial benefit from the ordinance.

As the Court explained in *City of Philadelphia*, "The evil of protectionism can reside in legislative means as well as legislative ends." 437 U.S. at 626. A requirement of local processing is precisely the type of invalid legislative means that has consistently been struck down.

Contrary to Respondent's assertion, the fact that legislation may impose some burden on local residents does not establish its validity under the Commerce Clause. An export ban *always* places a burden on *some* local residents. A requirement that natural resources remain at home burdens local owners of those resources. A requirement that local coal be used in producing electricity raises prices for local ratepayers. A requirement of local processing prior to interstate shipment burdens local exporters. The determinative question is not the presence or absence of a local burden, but the fact that "the practical operation and effect of the provisions complained of will be directly to obstruct and burden interstate commerce." *Foster-Fountain*, 278 U.S. at 13. This is precisely what Local Law 9 does.

In any event, the net effect of Local Law 9 is to *benefit*, rather than to burden, local residents. With or without flow control, Clarkstown residents must ultimately bear the cost of the town's guarantee to the designated facility. As to local trash, flow control is essentially neutral—it means only that the cost is paid through increased tipping fees, rather than higher taxes or utility bills. But for every ton of out-of-town trash that Clarks-

town can force Petitioners to send to the designated facility, rather than directly to final disposal sites, the town's potential liability under its guarantee is reduced by $81. Thus, even if the existence of a local burden were relevant—which it is not—Local Law 9 imposes no net burden on local residents in this case and creates a financial advantage for the town.

III. EVEN UNDER THE *PIKE* BALANCING TEST, APPLICATION OF LOCAL LAW 9 TO PETITIONERS' BUSINESS IS INVALID

Even if Local Law 9 were analyzed under the *Pike* balancing test applicable to laws having only an incidental effect on interstate commerce, it would have to be struck down. Respondent does not deny that Local Law 9's local processing requirement requires Petitioners to pay an additional $81 per ton for disposal of their nonrecyclable trash. Nor does Respondent deny that Local Law 9 harms Petitioners' out-of-town customers by depriving them of a lower cost alternative for disposing of their trash. And Respondent does not deny that flow control laws discourage technological innovation in trash processing, and discourage entry into the trash processing business. *See* Pet. Br. 31-35.

The burden on interstate commerce is exacerbated here because much of the trash handled by Petitioners originates in New Jersey. Pet. App. 26a. Under New Jersey's flow control laws, local waste may be taken out of the state for the sorting of recyclables—"as long as the residual solid waste is returned to New Jersey." New Jersey Br. 5. But under Local Law 9, Petitioners are *prohibited* from taking the New Jersey-originated residue back to New Jersey. It is thus literally impossible for Petitioners to comply with the flow control laws of both jurisdictions. This type of actual conflict among jurisdictions is a significant, if not dispositive, factor weighing against the validity of the measure. *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 526-28 (1959);

Southern Pac. Co. v. Arizona, 325 U.S. 761, 773 (1945).[20]

Respondent and its amici assert a variety of justifications for Local Law 9 based on the health, waste management, and environmental benefits of the transfer station in comparison with the local landfill that it replaced. Clarkstown has the unquestioned right to pursue those goals by adopting nondiscriminatory standards with respect to the handling of trash, applicable alike to Petitioners and the designated facility. But that is not what Local Law 9 does.[21]

Respondent maintains that Local Law 9 is needed to ensure proper processing of the trash and to ensure that the trash will not go to cheap, environmentally unsound landfills. Resp. Br. 25, 45. But as far as the record discloses, the processing that occurs at the designated facility and the processing that occurred at Petitioners' facility does not differ in any material respect, except

[20] The balancing test does not depend on whether a burden on interstate commerce has actually caused a redirection of the flow of commerce. In *Southern Pacific*, for example, this Court did not require a showing that Arizona's limit on train lengths had actually caused train routes to be diverted around Arizona.

[21] Respondent's attempt to justify Local Law 9 as a quarantine, Resp. Br. 18-19, will not withstand analysis. The essence of a quarantine law is to keep dangerous commodities out of a locality, or at least to minimize their exposure, because "their very movement risked contagion and other evils." *City of Philadelphia*, 437 U.S. at 628-29. But here, Local Law 9 requires *additional* movement and *additional* exposure of the trash. In the absence of flow control, Petitioners' nonrecyclable trash would be loaded into closed vehicles and moved directly to out-of-state destinations, with no further exposure in Clarkstown. Local Law 9 requires that, instead, the nonrecyclable trash be moved from Petitioners' facility to the designated transfer station, unloaded, subjected to further handling, and then re-loaded for transport out of state.

Further, Clarkstown has contracted with at least one other jurisdiction to bring *more* trash into the town for processing at its facility. J.A. 28, R. 129; J.A. 118, R. 333. This fact alone belies the characterization of Local Law 9 as a quarantine.

that Petitioners separated the recyclables from nonrecyclables. And it is undisputed that the town's designated transfer facility sends its trash to some of the same landfills as Petitioners. Carbone Aff., J.A. 118, R. 333; *accord* New York State Br. 20 n.13.[22]

Moreover, flow control laws are just as likely to lead to disposal at *less* environmentally sound sites than would be selected in a free market. *See* National Solid Waste Management Association Br. 6-7 (citing Ohio experience). Waste generators that would prefer to minimize potential liability by directing all waste to a few specialized state-of-the-art disposal sites are precluded from doing so by flow control laws. *Id.; see also* Chemical Manufacturers Association Br. 5-6.[23]

Respondent also seeks to justify Local Law 9 as necessary to obtain financing for the designated transfer station. Resp. Br. 8-9, 30. But Clarkstown did not enact Local Law 9 until nearly a year *after* awarding the contract for the construction and operation of the transfer station.[24] Only the take-or-pay tonnage guarantee

[22] As to disposal sites located outside Clarkstown, those sites are properly regulated by their respective localities and by the federal government. "If farmers or manufacturers in Vermont are abandoning farms and factories, or are failing to maintain them properly, the Legislature of Vermont and not that of New York must supply the fitting remedy." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 524 (1935).

[23] Other justifications asserted for flow control are made irrelevant by the fact that the trash involved here originated out of town and was headed out of state. In this context, Local Law 9 has nothing to do with obtaining an accurate characterization of local waste streams, *see* New York State Br. 12, or monitoring hazardous waste at landfills. *See* Solid Waste Assoc. of North America Br. 8. Nor does the shipment of out-of-town waste to out-of-town sites interfere with the ability of a locality to reduce the generation of local trash through imposing high disposal or utility fees. *See* Prince George's County Br. 27; New York State Br. 12.

[24] The town awarded the contract for the construction and operation of the transfer station in January 1990. Pet. App. 4a. It

was even arguably pertinent to the financing of the facility, not flow control itself. And in any event, Respondent cites no authority for upholding a revenue measure, otherwise violative of the Commerce Clause, based on the benefits of the governmental projects for which the revenue measure was enacted.

Moreover, Local Law 9 is being applied here to out-of-town waste, not to waste generated by local residents. *Not one* of Respondent's many amici even suggests that a locality must guarantee control of all *out-of-town* waste that enters its borders in order to obtain financing. Nor could they. Since the volume of out-of-town waste to a facility such as Petitioners' is determined by competitive factors such as price, there can be no assurance of continued volume when flow control is used to impose an artificial price.[25]

In the end, the only real "benefit" is the town's interest in reducing its payments under the tonnage guarantee. Pet. Br. 31. This purely economic interest—itself evidence of protectionism—is plainly insufficient to justify the burden imposed on interstate commerce by the Clarkstown ordinance.

IV. CONGRESS HAS NOT AUTHORIZED THIS DISCRIMINATION AGAINST INTERSTATE COMMERCE

As a final line of defense, a few amici—though not Respondent—have argued that, even if flow control laws restrict interstate commerce, Congress authorized them in one section of the Resource Conservation and Recovery

---

adopted Local Law 9 on December 31, 1990. Holbrook Aff., J.A. 9, R. 58; Amended Verified Complaint, R. 394.

[25] Indeed, the National Association of Bond Lawyers appends two examples of municipal bonds, neither of which contemplates restrictions on out-of-town trash. Bond Lawyers Br. A-15, A-43. Similarly, New Jersey, a proponent of flow control, acknowledges in its amicus brief that under its flow control laws, "no attempt is made by New Jersey to direct waste merely being processed in . . . New Jersey." New Jersey Br. 5.

Act ("RCRA"), 42 U.S.C. § 6945(a)(5).[26] However, that provision, which says nothing about flow control, falls far short of the clear and unambiguous congressional action necessary to authorize a local interference with interstate commerce.

This Court's opinions establish a strict "rule requiring a clear expression of approval by Congress" before holding state legislation immune from Commerce Clause scrutiny. *Wunnicke*, 467 U.S. at 92. Thus, in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), despite thirty-seven federal statutes and a number of interstate compacts demonstrating congressional deference to state water law, the Court found no indication "that Congress wished to remove federal constitutional restraints on such state laws" restricting the export of ground water. *Id.* at 960. The Court noted, "In the instances in which we have found such consent, Congress' " 'intent and policy' to sustain state legislation from attack under the Commerce Clause" was " 'expressly stated.' " *Id.* (citation omitted). In its most recent decision on this point, the Court again emphasized that the local entity has a "burden of demonstrating a clear and unambiguous intent on behalf of Congress to permit the discrimination against interstate commerce. . . ." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 802 (1992).

Amici have not pointed to any statutory provision that satisfies this test. Section 4003(a)(5) of RCRA, 42 U.S.C. § 6943(a)(5), requires only that states permit local jurisdictions to enter into long-term contracts for the supply of solid waste to recycling facilities and for the sale of the products of those facilities. On its face, this provision does not authorize flow control laws. It is concerned with municipal *contracting* authority, not with municipal *regulatory* authority. Moreover, it deals with limitations imposed by state law, not with the restrictions

---

[26] *See, e.g.*, National Association of Bond Lawyers Br. 17-22. In similar circumstances, this Court has declined to address the issue. *See Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2016 n.9 (1992).

imposed by the Commerce Clause. There is no indication that Congress "affirmatively contemplate[d] otherwise invalid state legislation" and manifested a "clear and unambiguous intent" to permit local jurisdictions to interfere with the free flow of interstate commerce. *Wunnicke*, 467 U.S. at 91-92; *Wyoming*, 112 S. Ct. at 802.[27] To the contrary, Congress emphasized that it "intends this prohibition [of Section 4003(a)(5)] to be as narrow as it is written and to apply only to prohibitions on the long term supply of discarded materials from a governmental body to a resource recovery facility." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 34 (1976), *reprinted in* 1976 U.S.C.A.A.N. 6238, 6272.

The limited scope of § 4003(a)(5) is confirmed by the EPA's subsequent interpretation. Noting that "[t]his section reflects the concern that the development of resource recovery facilities has been hindered by restrictive procurement laws," 43 Fed. Reg. 38,534, 38,538 (1978), EPA implemented this provision with regulations that did not approve or even refer to flow control. 40 C.F.R. §§ 256.01(b)(5), 256.30(b), 256.31(b). Indeed, in a different subsection, EPA affirmed the concept of free movement of solid waste among jurisdictions:

> (h) The State plan should provide for substate cooperation and policies for free and unrestricted movement of solid and hazardous waste across State and local boundaries.

40 C.F.R. § 256.42(h). *See also* 44 Fed. 45,066, 45,076 (1979) (preamble).

Nor has Congress itself treated RCRA as an authorization of flow control. To the contrary, flow control is

[27] The National Association of Bond Lawyers also cites Section 32(f) of the Solid Waste Disposal Act Amendments of 1980, codified at 42 U.S.C. § 6948(d)(3)(C), but this provision is completely ambiguous. It authorizes technical assistance to local governments in removing "legal, institutional, and economic impediments" to resource recovery and conservation, but does not discuss what those "impediments" are. They may well include *restrictions* on interstate movement of waste, such as those imposed here.

just now receiving serious congressional attention, and bills to authorize flow control in specified circumstances are currently pending.[28] Thus far, however, the only action taken by Congress has been to request EPA to study the impact of flow control laws and to report its conclusions to Congress by September 1994.[29] EPA has just completed a series of public hearings, 58 Fed. Reg. 37,477 (1993), in which it received a wide range of comments both supporting and opposing flow control.[30]

This ongoing congressional and administrative attention confirms that flow control is not authorized by existing legislation. It also confirms that Congress is well aware of the interstate repercussions of such laws and, with the advice of EPA, is actively addressing the issue. If there are valid policy reasons for permitting state or local restrictions on the export of trash, Congress is fully empowered to authorize such action—subject to whatever limitations it may decide are appropriate. But no local jurisdiction can, consistent with the Commerce Clause, *require* local processing of trash in the absence of congressional authorization.[31]

[28] H.R. 1357, 103d Cong., 1st Sess. (Mar. 16, 1993); H.R. 2649, 103d Cong., 1st Sess. (July 15, 1993).

[29] H.R. Conf. Rep. No. 902, 102d Cong., 2d Sess. 48 (1992), accompanying Pub. L. 102-389, 106 Stat. 1571.

[30] EPA's Notice called for comments on such issues as the health, environmental, and economic impacts of flow control; the potential inefficiencies that flow control may foster; possible free market approaches to achieve flow control goals, and nonlegislative options. 58 Fed. Reg. at 37,478.

[31] The City of Springfield seeks to characterize the designated facility here as a "public" facility and argues that the town, as a market participant, can compel use of the facility free of Commerce Clause limitations. Springfield Br. 25-26. But even if Clarkstown's designated facility were government-owned, which it is not, the market participant doctrine has no application here. That doctrine permits a state or locality to discriminate in favor of its residents when acting as a purchaser or seller on the open market; that is, the government in that situation has the prerogative to choose with whom it will deal, like any other purchaser or seller. *Reeves, Inc. v. Stake*, 447 U.S. 429, 439-40 (1980); *Hughes*

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

BETTY JO CHRISTIAN
Counsel of Record

PAUL J. ONDRASIK, JR.
CHARLES G. COLE
DAVID A. PRICE
STEPTOE & JOHNSON
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 429-3000

DAVID SILVERMAN
KENNETH RESNIK
GRANIK SILVERMAN
254 South Main Street
New City, New York 10956-0370
Counsel for Petitioners

---

v. Alexandria Scrap Corp., 426 U.S. 794, 806, 808 (1976). But Petitioners are not seeking to do business with the designated facility; they are being *required* to do business with it. Local Law 9 is plainly a regulatory measure outside the market participant exception. *See New Energy Co. v. Limbach*, 486 U.S. 269, 277-78 (1988).

The Sherman Act theory of Prince George's County, Maryland and the City of San Diego is based on a fundamental misconception of the antitrust immunity set out in *Parker v. Brown*. These amici apparently contend that if a local law is immune from antitrust attack, then it should also be immune from Commerce Clause attack. Prince George's County Br. 47-49; San Diego Br. 26-27. The state action doctrine is an exception to existing prohibitions in antitrust laws; to hold that it amounts to congressional authorization of all state-sanctioned conduct for Commerce Clause purposes would have the result of all but eliminating the negative Commerce Clause.

Supreme Court, U.S.
FILED
JUL 16 1993
OFFICE OF THE CLERK

No. 92-1402

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC., and ANGELO CARBONE,

Petitioners,

vs.

TOWN OF CLARKSTOWN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, OF THE STATE OF NEW YORK

BRIEF FOR *AMICI CURIAE* INCORPORATED VILLAGES OF WESTBURY, MINEOLA AND NEW HYDE PARK; NEW YORK STATE CONFERENCE OF MAYORS AND MUNICIPAL OFFICIALS; AND AMERICAN REF-FUEL COMPANY OF HEMPSTEAD IN SUPPORT OF REVERSAL

LAWRENCE W. BOES
Counsel of Record
FULBRIGHT & JAWORSKI L.L.P.
666 Fifth Avenue
New York, New York 10103-3198
(212) 318-3289

(For Further Appearances See Reverse Side of Cover)

BEST AVAILABLE COPY

JEROME F. MATEDERO, ESQ.
Village Attorney of the
Incorporated Village of Westbury
325 Maple Avenue
Westbury, New York 11520
(516) 338-4100

JOHN M. SPELLMAN, ESQ.
JOHN P. GIBBONS, JR., ESQ.
SPELLMAN & WALSH
Counsel for the Incorporated Village of Mineola
59 Hilton Avenue
Post Office Box 7775
Garden City, New York 11530
(516) 747-1640

STEVEN M. ORBON, ESQ.
Village Attorney of the
Incorporated Village of New Hyde Park
414 Jericho Turnpike
New Hyde Park, New York 11040
(516) 352-0544

DONNA M.C. GILIBERTO, ESQ.
General Counsel to the New York
State Conference of Mayors and Municipal Officials
119 Washington Avenue
Albany, New York 12210
(518) 463-1185

TABLE OF CONTENTS

		Page
I.	INTRODUCTION	1
II.	INTEREST OF THE *AMICI CURIAE*	2
III.	A CASE HISTORY OF MUNICIPAL "FLOW CONTROL" LAWS AS THEY AFFECT OTHER MUNICIPALITIES AND TAXPAYERS	11
IV.	SUMMARY OF ARGUMENT	38
V.	ARGUMENT FOR REVERSAL OF DECISION OF THE NEW YORK COURT	41
VI.	CONCLUSION	47

TABLE OF AUTHORITIES

Page

Cases

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992) 42

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)42

Container Corp. of Carolina v. Mecklenburg County, No. 3:92 cv-154-MU (D.N.C. June 22, 1992) 46

Fort Gratiot Sanitary Landfill Inc. v. Michigan Dep't of Natural Resources, 112 S.Ct. 2019 (1992) 41

Government Supplies Consol. Servc. Inc. v. Boyle, 975 F.3d 1267, 1277 (7th Cir. 1992); cert. denied, 113 S.Ct. 977 (1993) 46

Harvey & Harvey v. Delaware Solid Waste Auth., 600 F.Supp. 1369 (D. Del. 1985) 42

Hybud Equip. Corp. v. Akron, 654 F.2d 1187 (6th Cir. 1981), vacated on other grounds, 455 U.S. 931 (1982), on remand, 742 F.2d 949 (6th Cir. 1984), cert. denied, 417 U.S. 1004 (1985) 43

J. Filiberto Sanitation, Inc. v. Dep't of Environmental Protection, 857 F.2d 913 (3d Cir. 1988) 42

Stephen J. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I.) aff'd mem. substantially on the district court's decision granting preliminary injunction, 947 F.2d 1004 (1st Cir. 1991) 43-46

Town of North Hempstead v. Village of Westbury, 153 Misc.2d 225, 581 N.Y.S.2d 536 (Sup. Ct. Nassau County 1991), rev'd, 182 A.D.2d 272, 588 N.Y.S.2d 293 (2d Dep't 1992), appeal dismissed, 80 N.Y.2d 1023, 592 N.Y.S.2d 671, 607 N.E.2d 818 (1992), appeals denied, 81 N.Y.2d 706, 597 N.Y.S.2d 936, 613 N.E.2d 968 (1993), motion for reargument pending, Motion No. 93/456 (N.Y. Ct. App. submitted April 26, 1993) 6, 10, 15, 21-23, 27-30

Waste Recycling Inc. v. Southeast Ala. Solid Waste Disposal Auth., 814 F.Supp. 1566 (M.D. Ala. 1993) .. 46

Waste Systems Corp. v. County of Mertin, 985 F.2d 1381 (8th Cir. 1993), aff'g 84 F. Supp. 641 (D. Minn. 1992) 46

Constitutional Provisions

Commerce Clause of the United States Constitution, art. I, § 8 ..... 30, 32, 39, 41-43, 46, 47

N.Y. Const. Art. IX, § 3(4) 13

N.Y. Munic. Home Rule Law §§ 10(5), 11(3) 2

N.Y. Town Law § 132 2

N.Y.S. Const. Art. IX, § 2(d) 2

Statutes

1983 N.Y. Sess. Laws, Ch. 299, adding § 27-0704 of the N.Y. Environ. Consev. Law 11

Amended Local Law, ch. 46, amending "Sanitation Code of the Town of North Hempstead," § 46-14(A) 15

N.Y. Pub. Auth. Law. § 2049-a-x 14

Miscellaneous

1992 State of the Town Message by North Hempstead Town Supervisor, Feb. 7, 1992, reproduced in Westbury's Appendix, pp. WA00250, at 252, 256, 259-60, 261, Town of North Hempstead v. Inc. Village of Westbury, 182 A.D.2d 272, 588 N.Y.S.2d 293 (2d Dep't 1992) 26

C. Gordon, Court Backs Town's Trash Control Right, Newsday, Aug. 21, 1992, p. 27 19

Caro, The Power Broker: Robert Moses and the Fall of New York (1974) 14

D. Mock, Inside the Hempstead Town Incinerator, Westbury Times, Jan. 23, 1992, p. 1 20

M. Whitely, Mayors "Jilted" - Town Files Injunction, Westbury Times, Feb. 20, 1992, p. 4, cols. 3-4 19

Rathje and Murphy, Rubbish! The Archaeology of Garbage 204 (1992) 4, 16

S. Lyall, From L.I. to Angry Illinois: A Five-Day Trash Odyssey, N.Y. Times, Dec. 26, 1991, p. A-1 17

U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract Supp., 1988 County and City Data Book ... 2

Introduction

This brief is submitted by a coalition of amici curiae in the State of New York. They share a close interest in the arguments for and against the constitutionality of State-authorized municipal "Flow-Control" laws and wish to set forth their particular interest in this case, resulting from their own practical experiences and litigation resisting a regime of "flow control" laws imposed by another municipality purportedly authorized by state law.

Participating in this brief are the Incorporated Villages of Westbury, Mineola and New Hyde Park, three suburban villages of sizable populations in the Town of North Hempstead, Nassau County, New York; the New York State Conference of Mayors and Municipal Officials ("NYCOM"); and the American Ref-Fuel Company of

Hempstead ("American Ref-Fuel"), a privately owned entity that operates a resource recovery (waste-to-energy) plant one-half mile south of the Village of Westbury.

I. INTERESTS OF THE *AMICI CURIAE*

A. The Incorporated Villages of Westbury, Mineola and New Hyde Park

The Incorporated Villages of Westbury, Mineola and New Hyde Park (the "Villages") are incorporated municipalities geographically located in the Town of North Hempstead, Nassau County, on Long Island, New York. (For almost all governmental functions, the Villages' areas are carved out by state law from the towns' constitutional and statutory jurisdiction. See N.Y.S. Const. Art. IX, § 2(d); N.Y. Munic. Home Rule Law §§ 10(5), 11(3); N.Y. Town Law § 132.) These villages comprise populations of about 14,000, 20,000 and 10,000 residents, respectively. (U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract Supp., 1988 County and City Data Book, pp. 768-69 (as of 1986, Westbury -- 13,640, Mineola -- 20,180 and New Hyde Park 9,510 residents).) They derive their revenues substantially from real property taxes, supplemented by administrative fees and penalties, parking meter fees and decreasing amounts of grants from federal and state funds. The Villages exercise a variety of local government powers, including enacting and enforcing building and zoning laws, minor police powers, maintenance of local streets, parks and recreational facilities, and the collection of garbage.

An ever increasing amount of these Villages' expenditures is devoted to collection, management and disposal of garbage or solid waste, collected by the Villages' sanitation departments and employees. These employees, using the Villages' sanitation trucks, periodically collect solid waste, both "recyclables" (newspapers, metals, glass and certain plastics and

compostable yard waste) and the non-recyclable residue which comprises about 75% to 85% of all such municipal solid waste ("MSW"). (See Rathje and Murphy, Rubbish! The Archaeology of Garbage 204 (1992) (estimating recyclables to be 15% of all MSW with a projected goal of 25% by the end of 1992).) Villages, cities, towns, special sanitary districts and other municipalities on Long Island (Nassau and Suffolk counties in New York State) historically exercised their own municipal powers under state law and under their general home-rule powers to dispose of this solid waste by various methods, but almost all utilized landfills are located in large part in unincorporated areas of the towns, the villages being more densely inhabited communities with little or no open areas.

Beginning in 1986 and continuing to date, these three Villages, which maintain their own municipal

sanitation collection departments, plus three other sizable villages with similar operations and about twenty-five other villages of varying sizes, which utilize private carters or public sanitary districts to collect residential solid waste, have been subjected to the Town of North Hempstead's "Flow Control" law (similar to the Town of Clarkstown's law) monopolizing the disposal of all solid waste generated or collected within the Town's boundaries, purportedly as authorized by state laws specifically enacted for the Town of North Hempstead (the "Town" or "North Hempstead") and its Solid Waste Management Authority (the "Authority"). As detailed in Point II infra, the Town imposed and the Authority receives monopoly-determined "tipping fees" for all solid waste collected by the villages and other public and private solid waste collectors. These fees have no necessary or legal relationship to the Authority's actual

disposal functions and costs, which transfers up to $2 million per year to the Town. Furthermore, even though "Flow Control" is usually justified in the name of financing the construction of solid waste facilities adequate to a municipality's long-term needs, the Town and Authority never implemented the original plan to build its own solid waste facility after five years of "Flow Control." The Town and Authority formally abandoned all such plans in early 1992, subcontracting all solid waste functions to subcontractors after an appeal against the Villages based on a purported "solid waste management program." Town of North Hempstead v. Inc. Village of Westbury, 153 Misc.2d 225, 581 N.Y.S.2d 536 (Sup. Ct. Nassau County 1991), rev'd, 182 A.D.2d 272, 588 N.Y.S.2d 293 (2d Dep't 1992), appeal dismissed, 80 N.Y.2d 1023, 592 N.Y.S.2d 671, 607 N.E.2d 818 (1992), appeals denied, 81 N.Y.2d 706, 597 N.Y.S.2d 936, 613 N.E.2d 968 (1993), motion for

reargument pending, Motion No. 93/456 (N.Y. Ct. App. submitted April 26, 1993).

As a result, the Villages and others in North Hempstead have been isolated from the solid waste disposal market and have been precluded from dealing with other governmental and private entities, such as American Ref-Fuel, which would provide disposal services within or without the county and state at a cost of at least $15 to $30 below the Town's monopoly-determined rates.

Therefore, the Villages and other villages in North Hempstead, which have supported the three Villages in related litigation brought against them in the New York State courts, support reversal of the decision which is now before this Court for review and urge its reversal, not solely on behalf of the private carters and disposal companies that are obviously disfavored by "Flow Control," but also on behalf of the Villages' taxpayers and residents

who are compelled to pay higher government-imposed fees, resulting in higher village real property taxes, that have no relationship to the actual disposal costs. Furthermore, artificially high "tipping fees" for the municipalities and agencies collecting them have engendered a perverse disincentive for the development of local waste reduction, recycling and composting programs in North Hempstead, because the town relies upon receiving maximum solid waste revenues in order to avoid raising its own taxes.

B. The New York State Conference of Mayors and Municipal Officials

The New York State Conference of Mayors and Municipal Officials ("NYCOM") is a not-for-profit, voluntary membership association for the cities and villages of the State of New York, which has as its goal the promotion of efficient municipal government. NYCOM's current membership consists of 59 of New York

State's 62 cities and 488 of its 558 villages, thereby representing the great majority of such municipalities.

In cooperation with cities and villages, NYCOM advocates and supports legislation, participates in litigation and provides information and education beneficial to the administration of municipal affairs and opposes legislation detrimental to cities and villages and the people therein. NYCOM also has a vital interest in the outcome of this and other cases because they will substantially affect the ability of its membership to contract freely for solid waste disposal services inside and outside of New York State. This ability to contract freely is essential to the effective functioning of local governments.

NYCOM has expressed its opposition to Flow Control legislation to Governor Cuomo of New York State and to the State's legislative leaders in the form of various

communications. NYCOM's primary aim is to safeguard those municipalities and public agencies obtaining "Flow Control" powers from using them to raise general fund revenues by mandating the disposal of solid waste at ""tipping fees" rates higher than the municipalities' actual disposal costs. Additionally, NYCOM was an amicus curiae in the case of Town of North Hempstead et al. v. Incorporated Village of Westbury., which involved the constitutionality of Flow Control in North Hempstead.

The authority to enact local Flow Control legislation has been granted to nearly half of New York's counties and to a smaller number of towns, cities and villages. NYCOM members represent the level of local government most directly involved in the collection of solid waste, and which thereby are most directly affected by Flow Control legislation.

III. A CASE HISTORY OF TOWN "FLOW CONTROL" LAWS AS THEY AFFECT OTHER MUNICIPALITIES AND TAXPAYERS

The Prologue: In 1983, as the seepage of toxic waste from industrial and municipal landfills was found to pollute the deep aquifers providing the water supply upon which Long Island's population depends for its needs, New York State enacted legislation banning all landfills on Long Island as of December 18, 1990. 1983 N.Y. Sess. Laws, Ch. 299, adding § 27-0704 of the N.Y. Environ. Consev. Law. The thirteen towns in Nassau and Suffolk counties, together with the two cities and many of the incorporated villages, capitalized on this "crisis" by planning State-encouraged solid waste management programs, including plans for "resource-recovery" plants, i.e., incinerators which also utilize the combustion heat to

generate electricity from steam power for sale to the local power company.

Also planned and implemented, and particularly effective at the most immediate local level, are recycling programs, requiring residents, commercial and industrial businesses, and public and private carters to separate recyclables, such as newspapers, metal cans and glass containers, "white metal" (discarded refrigerators and other household appliances), yard waste and construction and demolition debris ("C&D") for pick-up and delivery to public and private recycling facilities. These programs still leave the vast bulk (over 75% to 85%) of such MSW to be eventually discarded in "sanitary landfills" or burned. (See P. 4, supra.)

The Flow Control Laws: The officials of the Town, within whose borders the Villages are either wholly or partially located, developed an elaborate plan for a variety

of solid waste facilities, including a waste-to-energy incineration plant, a "materials recovery facility" or "MRF" composting and other facilities to be built on a 60-acre portion of a 460-acre sand and gravel quarry specifically purchased for this purpose in the Town's unincorporated areas near Port Washington. In order to implement this plan, the Town requested and the State enacted a "special law" (a "special law" is a law which "applies to one or more, but not all, counties, . . . cities, towns or villages." N.Y. Const. Art. IX, § 3(4)), Chapter 544 of the 1983 N.Y. Session Laws, authorized and directed the Town to enact a "Town-wide" Flow Control law. This State law, which generally tracks about sixty similar State laws enacted from 1975 through 1982, authorizing specific counties, towns, cities and groups of villages to enact Flow Control laws, also mandated the Town to determine and collect "tipping fees" for the centralized disposal of North

Hempstead's solid waste in Town-designated facilities, specifically, in order to obtain sufficient revenues to enable the Town to repay public bond financing for the construction and operation of the solid waste facilities to be built.

A second State law was enacted in 1984 to create a Solid Waste Management Authority (the "Authority") a "public authority" to which the Town in 1988 delegated its solid waste powers, responsibilities, personnel and property. (N.Y. Pub. Auth. Law. § 2049-a-x; see Caro, The Power Broker: Robert Moses and the Fall of New York 16, 632 (1974), for a thumbnail description of the New York "public authority" as a financing device supposedly "outside and above politics," yet this particular law made the elected Town Board the Authority's ex officio Board of Directors.)

In July 1986, after the Town had already cleared several regulatory and environmental hurdles in developing its plan, it enacted its own local Flow Control law, as a section of the Town's Sanitation Code, requiring that all acceptable solid waste and recyclables "generated or originated within the town, including municipalities located wholly or in part therein," be delivered to and disposed of in Town-designated facilities. (Amended Local Law, ch. 46, amending "Sanitation Code of the Town of North Hempstead," § 46-14(A), summarized in Town of North Hempstead v. Inc. Village of Westbury, 182 A.D.2d at 276-77, 588 N.Y.S.2d at 296.)

The Town Changes Its Direction: After the Town's engineering and legal consultants spent two and one half years developing the plan, the Authority purchased the 460-acre property for about $34 million and pledged its "tipping fee" revenues in a secured bank loan, however, a

newly elected Town Supervisor took office in January 1990. Pursuant to the "mandate" of his election campaign the Town systematically dismantled all plans because of "NIMBY" opposition to the construction of a resource recovery plant, notwithstanding that the Town's only landfill was subject to a statutory deadline of December 18, 1990. ("NIMBY" means "Not in my backyard." See Rathje and Murphy, Rubbish!: the Archaeology of Garbage 109, 208-09 (1992).) Nevertheless, the Town failed to develop any alternative plan, hoping that a sympathetic N.Y.S. Department of Environmental Conservation (the "DEC") would extend the deadline, which it did for one month, but a noxious gaseous stench and liquid seepage from the landfill caused a public storm and the Town's landfill was officially closed on January 19, 1991.

For almost two years from January 1991 through November 1992, the Town and its Authority entered into a series of emergency short-term contracts with a private carting company to transport North Hempstead's solid waste collected from its 216,000 residents and numerous businesses to unidentified out-of-town and out-of-state landfills and plants. (U.S. Dep't of Commerce, Bureau of Census, Statistical Abstract Supp., 1988 County and City Data Book, at 771 (as of 1986, Westbury -- 13,640, Mineola -- 20,180 and New Hyde Park 9,510 residents.) The reporter of Page One article in the N.Y. Times followed a Westbury resident's garbage from his backyard pick-up to a landfill site in Taylorville, Illinois. (S. Lyall, From L.I. to Angry Illinois: A Five-Day Trash Odyssey, N.Y. Times, Dec. 26, 1991, p. A-1.) Basically all of Westbury's residential MSW (with certain temporary and limited exceptions) must be trucked from Westbury in its

sanitation department's trucks five miles to a temporarily authorized and remotely located "transfer station" and, trucked from there by a private sub-contractor to its MRF in Greenpoint, Brooklyn, for further transhipment to out-of-town and out-of-state landfills in Pennsylvania, Ohio, Indiana or Illinois.

The Rates Climb: Of course, during this history of legal monopolization by the Town and Authority, the Authority's "tipping fee" rate, as unilaterally determined, rose from $16 per ton in 1976 to $66 per ton in 1990, and to $87 per ton in January 1991. The new Town Supervisor threatened in 1990 that the rate would rise to $125 or $150 or more per ton within a few years, but the Town and Authority actually raised the rate to $106 per ton in late 1991 and adjusted it to $104 per ton as of November 1992, as a result of pressure from the Town's Village Mayors. (See M. Whitely, Mayors "Jilted" - Town

Files Injunction, Westbury Times, Feb. 20, 1992, p. 4, cols. 3-4.)

There is no assurance, however, that this rate will ever be limited by actual disposal costs as determined by the regional solid waste disposal market created by private carting contractors and other disposal alternatives available to the Town and its Authority. The Town and Authority assert the legal right to determine the rate on the basis of their own governmental needs without consulting with their involuntary public and private "customers." (Id.; C. Gordon, Court Backs Town's Trash Control Right, Newsday, Aug. 21, 1992, p. 27.)

In contrast to the chaotic conditions of solid waste disposal in North Hempstead, Westbury, Mineola and New Hyde Park have had available, virtually in their backyards, a state-of-the-art resource recovery plant owned and operated by American Ref-Fuel and located

barely one-half mile south of Westbury in the neighboring Town of Hempstead, one and one-half miles from Mineola and about three miles from New Hyde Park. (See D. Mock, Inside the Hempstead Town Incinerator, Westbury Times, Jan. 23, 1992, p. 1.)

The Villages Bolt: When the North Hempstead landfill was closed in January 1991, Westbury's and Mineola's officials felt compelled by their fiduciary duties to deliver all or at least part of the Villages' MSW to the Hempstead plant at a "tipping fee" rate far below the official monopoly rate determined by North Hempstead and its SWMA. Westbury and Mineola entered into short-term contracts in late January 1991, to dispose of their solid waste or some portion thereof at American Ref-Fuel's Hempstead Resource Recovery Facility at a rate of $67 per ton -- versus the $87 per ton "tipping fee" then mandated by the Town of North Hempstead. The Villages also had

available to them the disposal facilities of American Ref-Fuel's sister resource-recovery plants in Essex County, New Jersey, and Preston, Connecticut, which had excess capacity to take MSW from Long Island. Also available were cheaper landfill alternatives then utilized by North Hempstead's favored subcontractor.

The Town and Authority Sue: As a result of these actions taken by the Villages, the Town and Authority commenced a legal action in the New York State Supreme Court, Nassau County, against Westbury, Mineola and American Re-Fuel. Town of North Hempstead v. Inc. Village of Westbury.

At the outset Westbury and Mineola stipulated they would comply with the Town's Flow Control law pending the lower court's final decision. That court granted Westbury's cross-motion for summary judgment declaring the State and Town laws unconstitutional under

the State Constitution and the Town's Flow Control law invalid as not clearly authorized by State law to supersede the Villages' powers. 153 Misc. 2d at 237-39, 581 N.Y.S.2d at 543-45. Companion actions by two other villages, including Great Neck Plaza and New Hyde Park, were initiated and virtually all of the Town's thirty villages participated by writing letters to the court and by filing an amici curiae brief on appeal in support of the order declaring "Flow Control" unconstitutional. Id. at 233, 581 N.Y.S.2d at 541; 182 A.D.2d at 280, 588 N.Y.S.2d at 298.

In addition, the decision of the New York Supreme Court (Wager, J.) dated December 20, 1991, stated as follows:

> In closing, the court opines that to the extent that the State gave the Town flow control power, if did so with the intention of providing the Town with a funding mechanism to construct a resource recovery facility. Were Chapter 544 and the Flow Control Law validly enacted, the court

> would nonetheless have been reluctant to grant the Town a permanent injunction allowing it to continue collecting tipping fees. These fees which should have been used to finance a resource recovery facility for the benefit of all the Town residents, have instead been used to finance, at best, a questionable purchase of 460 acres of land which is apparently not being used for any solid waste purpose as well as to pay for the out of Town shipment of the Town's solid waste and to maintain the salaries of allegedly unnecessary Authority personnel. The Town has failed to accomplish the stated solid waste disposal purposes of the legislation. Furthermore, it has been alleged that the villages individually could obtain, for themselves, out of Town shipment at a substantially lower cost than they are now required to pay to the Town.
>
> The court is aware of the financial stress this decision places on the Authority. However, this does not justify ignoring the home rule provision of the State Constitution. Nor should the plight of the Authority alone force the residents of the villages to bear the expense of the Town's ill-fated policy.

Id. at 239-40, 581 N.Y.S.2d at 545.

In the Interim: Based upon this final decision and pursuant to Westbury's and Mineola's stipulation to comply with Flow Control only until that decision was entered, these two Villages once again began transporting all or part of their MSW to American Ref-Fuel's plant for disposal at rates up to $30 per ton cheaper than the Town's new rate of $106 per ton effective in January 1992. After five weeks, the Town and Authority obtained an interim order from the Appellate Division, Second Department, expediting the civil appeal, which would otherwise take about two years from briefing to oral argument, and directing the two Villages to comply with the Town's Flow Control law pending their appeal.

Interestingly, after the appeal from the Supreme Court, Nassau County, had been taken, the Town's Supervisor admitted in February 1992 that the Town's solid waste management policies were wasteful

and that no state goal was furthered through its and the Authority's current activities. He described its solid waste disposal costs as "enormously expensive," that the previous Town administration's purchase of a 460-acre site solid waste disposal facilities "did all of a great disservice" because "the Town has to pay the banks millions in debt service" (meaning the Authority must do so funded by inflated "tipping fees" charged to the Villages and others), and that the Town engaged in "an irresponsible waste management program that laid waste to our environment." Because yard waste and leaves constitute a major part of the waste stream in spring, summer and fall, he maintained that, "To pay money to dispose of nature's recyclables is a crime" (however, the Town and Authority were then charging the Villages a rate of about $106 per ton for compostable wet leaves, the same as non-recyclable MSW, throughout this period), and concluded his

discussion of solid waste by pointing out that North Hempstead's previously planned incinerator was obviously proved to be unneeded because "we are surrounded by excess capacity and incinerators desperate for waste the same way a junkie craves a fix." At the same time, the, Town's attorneys were urging before the appellate court that the Town's Flow Control law must be enforced. The Town and Authority urged that the Villages be enjoined from utilizing these "excess capacity" and "desperate" private facilities as close as a half mile away and at "tipping fee" rates at least $30 per ton cheaper than the fee of the Town's mandated facility. (1992 State of the Town Message by North Hempstead Town Supervisor, Feb. 7, 1992, reproduced in Westbury's Appendix, pp. WA00250, at 252, 256, 259-60, 261, Town of North Hempstead v. Inc. Village of Westbury, 182 A.D.2d 272, 588 N.Y.S.2d 293 (2d Dep't 1992).)

The Intertwined Clarkstown and North Hempstead Appeals: The Appellate Division, Second Department, probably the busiest, most overtaxed and undermanned appellate court in the country, had, unbeknownst to Westbury's and Mineola's attorneys, already heard the appeal in this case, C&A Carbone, Inc. v. Town of Clarkstown, about three months earlier in November 1991. The court therefore expedited North Hempstead's appeal and it was briefed and heard in March 1992, less than three months after the lower court's decision.

In August 1992 the Appellate Division completely reversed the decision and order of the lower court in Town of North Hempstead v. Village of Westbury by granting the Town's and SWMA's motion for summary judgment, declaring the State and Town laws constitutional and valid and enjoining Westbury and Mineola from violating the Town's Flow Control law. - 182 A.D.2d 272, 588

N.Y.S.2d at 293. In a companion action brought by the Village of Great Neck Plaza the appellate court rejected its argument that enforcement of the Town's Flow Control law was conditioned on constructing the planned solid waste facilities, see id. at 281-82, 588 N.Y.S.2d at 299, although also relying upon the state law rationale that Flow Control is not "unconstitutional because it provides a funding mechanism for financing the construction of resource recovery facilities . . . ." Id. at 284, 588 N.Y.S.2d at 300.

Two weeks later, the Appellate Division, Second Department, by a different panel decided C&A Carbone v. Town of Clarkstown, acknowledging the Petitioners' claim herein "that the enactment of the local law was financially motivated . . . ." 182 A.D.2d at 220, 587 N.Y.S.2d at 685. That court justified this critical concession by contending that, "A concern for the continued economic viability of a

solid waste management facility established pursuant to such a [solid waste management] plan does not negate or detract from, but in fact is a part of the health, safety, and environmental concerns such plan is designed to address," citing Town of North Hempstead v. Village of Westbury, while ignoring that North Hempstead acknowledged it had no DEC-approved plan nor any solid waste facility to be constructed from Flow Control revenues. Id. at 221, 587 N.Y.S.2d at 685-86. The court also emphasized in C&A Carbone that the State legislation authorizing Flow Control after the Town of Clarkstown had already passed its law confirmed "the 'governmental and public purpose' of 'displacing competition' so that public welfare rather than profit is the focus of solid waste management," 182 A.D.2d at 221, 587 N.Y.S.2d at 686, while brushing aside that Clarkstown's law mandated supra-competitive profits by charging $11 per ton over the private transfer station's

"tipping fee," or that North Hempstead's fee was admittedly "enormously expensive," $20 to $30 higher than American Ref-Fuel's fee.

Subsequently, in Town of North Hempstead v. Village of Westbury, the New York Court of Appeals denied review by right and by leave. 80 N.Y.2d 1023, 592 N.Y.S.2d 671, 607 N.E.2d 818 (1992); 81 N.Y.2d 706, 597 N.Y.S.2d 936, 613 N.E.2d 968 (1993). Nevertheless, even though the Town and Authority urged that no Commerce Clause claim had been raised by Westbury and Mineola in that case, the Court of Appeals has not denied the Villages' motion for reargument, which has been pending for over two months after learning that this Court had granted review of the Town of Clarkstown case. Motion No. 93/456 (N.Y.Ct. App. submitted April 26, 1993).

Retaliatory Lawsuits: At about the same time as the Villages' motion for reargument was made, urging

that the Villages' and C&A Carbone cases were inextricably intertwined, the Town and Authority retaliated by commencing a second series of legal actions, one against Westbury and Mineola for money damages sustained and civil penalties incurred during the one-month period in January 1992 during which Westbury allegedly failed to deliver 900 and Mineola 1100 tons of MSW, respectively, to the Town's transfer station. They also sued New Hyde Park on similar claims, but for larger amounts of MSW allegedly not delivered to the Authority's transfer station. Westbury filed an answer and counterclaim in its action, alleging that the State and Town Flow Control laws impede and preclude it from dealing with American Ref-Fuel and related entities under its right pursuant to the Commerce Clause to dispose of its MSW in the free market of interstate commerce.

This case history of these closely related cases demonstrates that State and Town Flow Control laws not only directly impede interstate commerce in solid waste performed by private carters and owners of private recycling centers and transfer stations, they also substantially raise the costs of villages, cities and other municipalities and taxes of these municipalities, and keep them from utilizing cheaper, more suitable and more efficient public and private facilities with excess capacity that would benefit from this business. To strike down Flow Control in the egregious circumstances present in North Hempstead or Clarkstown does not endanger local governments' legitimate efforts to statutory and regulatory safeguard their residents from solid waste pollution and other sound objectives. Instead, when Government becomes a monopoly profiteer in disposing of

solid waste, all incentives for reduction and recycling programs fly out the window.

The Newspaper Story: One of the most egregious effects of "Flow Control" in North Hempstead is, for example, its treatment of the Villages' newspapers waste. Collected newspapers are collected every Wednesday in Westbury from the residences' curbside and trucked over five miles to the Authority's only transfer station and there deposited pursuant to a 1986 Recycling Agreement supposedly "free of charge" (actually, of course, Westbury and Mineola pay the cost of disposing of "recyclables" by increased fees on other MSW). Westbury's empty trucks return five miles to the Village, followed by the Authority's private trucker's larger trucks filled with Westbury's and other municipalities' newspapers bound for a private recycling company barely one-half mile east of Westbury. So much for efficiency and economy.

Peculiar Facts Concerning the
Incorporated Village of New Hyde Park

The so-called "Flow Control" laws of the State of New York and the Town of North Hempstead have created certain legal and practical problems for the Incorporated Village of New Hyde Park because it is only partially located in North Hempstead.

New Hyde Park is nearly equally split by the territorial boundary line separating the Towns of Hempstead and North Hempstead. However, their local laws differ markedly. Hempstead's code specifically provides that its solid waste regulations apply only to municipalities lying fully within that town's territorial borders, thereby in legal effect "exempting" New Hyde Park from its control. North Hempstead, on the other hand, made its "Flow Control" fully applicable to all areas lying within that town's geographical limits, thereby

"annexing" the northerly half of the Village of New Hyde Park into its solid-waste jurisdiction.

This dichotomy resulted in the creation of a legal and practical conundrum for New Hyde Park; while it is free to carry out its own waste collection regulations and procedures in the Hempstead portion of the village, and dispose of those collections pursuant to contracts negotiated by its Board of Trustees in its residents' and taxpayers' best interests, it is forced to impose and carry out North Hempstead's regulatory requirements in its northerly half, disposing of the garbage collected in that portion at the Authority's transfer station at costs dictated by that agency. New Hyde Park's own officials have no say in those matters whatsoever, a source of ongoing friction between the Town and Village.

Garbage collection and disposal costs have always been funded as a Village-wide charge, paid out of the

budgetary appropriations of its General Fund. Village taxpayers foot the bill for all solid waste collection and disposal on an equalized basis.

As a result of New Hyde Park being compelled to dispose of solid waste generated within the North Hempstead portion of the Village at the Authority's artificially high rates, $30 ormore abovee "spot market" rates, New Hyde Park's taxpayers are forced to pay significantly higher costs to subsidize those operations than the Village incurs for the disposal of its Hempstead residents' garbage.

Also, since the only means available to New Hyde Park to control its sanitation costs lies in waste reduction and recycling, it requires "source separation" of bulk pick-ups (such as old furniture), "white metal" (refrigerators, appliances and similar items), concrete and construction debris, grass clippings, similar yard waste and leaves, from

household or routine MSW. All recyclables are picked up and disposed of on a Village-wide basis, and with the exception of glass, cans and newspapers (all of which are disposed of, "at no cost," at the Authority's transfer station), the Village disposes of other recyclables at facilities and prices contracted by the Village Board. It is that practice which has resulted in a lawsuit for $1 million in money damages and $1 million in civil penalties being filed by the Town and Authority against New Hyde Park, the premise of that action being that they are entitled to receive all such waste at the Authority's transfer station under North Hempstead's Flow Control law, and that they were deprived of the "profits" to be realized by the payment of "tipping fees" established by them with respect to those recyclables and other waste directed to other facilities.

While New Hyde Park is confident that a motion to dismiss this action will be granted, indications are the Town will seek to file subsequent notices of claim and will continue to pursue the matter on the merits. In such event the Village is prepared to defend vigorously, raising constitutional and other affirmative defenses in its behalf, including arguments that the state enabling act and the Town's local laws enacted pursuant thereto, or their application to the Village, violate the provisions of the Commerce Clause of the United States Constitution.

IV. SUMMARY OF ARGUMENT

The amici curiae cannot and will not attempt to improve upon the legal arguments made by Petitioners herein under the Commerce Clause jurisprudence of this Court. They can, however, point out that Flow Control laws of local municipalities, usually authorized or mandated by specific state laws upon some regional basis,

severely affect the powers, responsibilities and taxes of those other legal governments that actually collect the solid waste. These municipalities must now dispose of their solid waste pursuant to the unilaterally determined fiats and economic terms of an "umbrella" government such as the Town and Authority that have little or no function except "managing" the "flow" of solid waste and the cash that must flow with it. Not only are "tipping fee" costs artificially raised by "Flow Control," the Villages' taxes must be raised to match those increasing fees. The Villages and other tax-supported municipalities are precluded or "locked in" from dealing with more convenient, more stable and more environmentally safe outlets for their solid waste, such as American Ref-Fuel. In turn, private and public competitors are "locked out" from disposing of North Hempstead's solid waste, because of "sweetheart" deals negotiated by a Town and Authority

that need not themselves raise the funds by taxes to pay for such inflated contracts. And, as the disposal problems are removed from local hands, recycling, composting and waste reduction programs are discouraged as Village and Town trucks transport tons of newspaper waste back and forth across the county. The Authority charges the Village $104 per ton to dispose of compostable wet leaves, a practice the Town Supervisor himself condemns as a "crime." Therefore, rather than rehearse once again the plain dictates of the Commerce Clause, the amici curiae will demonstrate the practical effects of Flow Control by reference to the discussion in the few Flow Control cases that have already been decided in the lower federal courts.

V. ARGUMENT FOR REVERSAL OF THE DECISION OF THE NEW YORK COURT

The earlier case law in this Court on garbage or solid waste as an article of commerce dealt with state and local laws prohibiting, hindering or discriminatorily taxing the import of solid or hazardous waste into a state or subdivision thereof, which laws were generally held to violate the "dormant Commerce Clause" of the U.S. Constitution. E.G., Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S.Ct. 2019 (1992) (holding state and local laws unconstitutional under Commerce Clause, which gave counties option to prohibit import of solid waste whether in-state or out-of-state); Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992) (holding differential fee structure for

imported hazardous waste unconstitutional under Commerce Clause); City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (leading solid waste case, holding state law prohibiting solid waste import unconstitutional under Commerce Clause by discriminating against out-of-state waste based on State's "economic protectionism").

Following City of Philadelphia v. New Jersey, the lower federal courts generally held "Flow Control" statutes monopolizing the export of solid waste from a State or its subdivisions constitutional. J. Filiberto Sanitation, Inc. v. Dep't of Environmental Protection, 857 F.2d 913 (3d Cir. 1988) (holding county "Flow Control" regulations constitutional under Commerce Clause in case arising from public vs. private transfer station operations); Harvey & Harvey v. Delaware Solid Waste Auth., 600 F. Supp. 1369 (D. Del. 1985) (holding state authority's Flow Control regulation constitutional under Commerce Clause

as "evenhanded" and nonsignificant burden on interstate commerce, absent proof that such burden outweighs public health and environmental benefits of public landfill vs. private carters' interstate outlets); Hybud Equip. Corp. v. Akron, 654 F.2d 1187, 1194-95 (6th Cir. 1981), vacated on other grounds, 455 U.S. 931 (1982), on remand, 742 F.2d 949 (6th Cir. 1984), cert. denied, 417 U.S. 1004 (1985).

Beginning in 1991, however, the tide of "Flow Control" decisions under the Commerce Clause turned with the decision of a district court in Rhode Island, which was affirmed by the First Circuit. Stephen J. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I.) aff'd mem. substantially on the district court's decision granting preliminary injunction, 947 F.2d 1004 (1st Cir. 1991). In contrast to the previous Flow Control cases, which looked primarily to the statements of statutory purposes and legislative

findings, the federal court in Rhode Island looked at the underlying realities of a state law which required all commercial waste to be brought to a central landfill in Rhode Island at $49 per ton versus bringing it to licensed disposal sites in Massachusetts at considerably lower rates. Id. at 783. The court understood that Rhode Island's state-wide authority needed commercial solid waste at $49 per ton in order to obtain a "profit" to subsidize its central landfill's charges of $14 per ton for Rhode Island's municipalities. The district court analyzed this as conferring "a direct economic advantage" on the Rhode Island public authority "as a participant in the market." Id. at 783.

The court also analyzed the reality of the Rhode Island law which could not be justified as promoting resource recovery by "diverting solid waste from out-of-state facilities where it is burned to generate electricity to

the CLF [central landfill] where it is buried." Id. Nor could the Flow Control regulations be explained as preserving public resources or health of residents. Id. at 784. Nor did it serve to eliminate illegal disposal; indeed, it increased that risk. Id. Nor did Flow Control eliminate potential liability of the State and its municipalities or reduce traffic. Id. at 784-85. Finally, the only plausible rationale for Flow Control -- to facilitate construction of publicly owned waste-to-energy facilities -- was not shown to be achievable by less coercive means when one realizes that Flow Control measures were basically needed because of artificially high or supra competitive "tipping fees" in order to subsidize other activities. Id. at [illegible]. As the court summarized, "In short, the mere fact that construction of a waste-to-energy facility may be a legitimate local purpose does not mean that any method of achieving that purpose is therefore legitimate. The

method selected must be evaluated in light of the burden it places on interstate commerce and the availability of less burdensome alternatives." Id.

To the same effect, see Waste Systems Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993), aff'g, 784 F. Supp. 641 (D. Minn. 1992) (holding counties' Flow Control ordinances unconstitutional under Commerce Clause); Waste Recycling, Inc. v. Southeast Ala. Solid Waste Disposal Auth., 814 F.Supp. 1566 (M.D. Ala. 1993) (holding various local Flow Control ordinances unconstitutional under Commerce Clause); Container Corp. of Carolina v. Mecklenburg County, No. 3:92 cv-154-MU (D.N.C. June 22, 1992) (unreported decision; granting preliminary injunction based on probable unconstitutionality of county Flow Control); cf. Government Supplies Consol. Servc. Inc. v. Bayh, 975 F.2d 1267, 1277 (7th Cir. 1992); cert. denied, 113 S.Ct. 977

(1993) (holding state "backhaud" ban, vehicle registration, "tipping fee" and surety bond requirements for solid waste truckers unconstitutional under Commerce Clause). Contra, Town of Clarkstown v. C & A Carbone, Inc. These decisions in the lower federal courts have concluded that Flow Control satisfies no legitimate health or safety concerns of the municipalities but merely feeds their need for revenue producing sources.

V. CONCLUSION

Therefore, it is respectfully submitted that the decisions of the courts herein should be reversed and the

Town of Clarkstown's local Flow Control law and the State's statutory authorization should be declared unconstitutional under the Commerce Clause.

Respectfully submitted,

LAWRENCE W. BOES
Counsel of Record for Amici Curiae
FULBRIGHT & JAWORSKI L.L.P.
666 Fifth Avenue
New York, NY 10103-3198
(212) 318-3289

Jerome F. Matedero, Esq.
Village Attorney of the
Incorporated Village of Westbury
325 Maple Avenue
Westbury, N.Y. 11520
(516) 338-4100

John M. Spellman, Esq.
John P. Gibbons, Jr., Esq.
SPELLMAN & WALSH
Counsel for the Incorporated Village
of Mineola
229 Seventh Street, Suite 100
Post Office Box 7775
Garden City, N.Y. 11530
(516) 747-1640

Steven M. Orbon, Esq.
Village Attorney of the
Incorporated Village of New Hyde
Park
414 Jericho Turnpike
New Hyde Park, N.Y. 11040
(516) 352-0544

Donna M.C. Giliberto, Esq.
General Counsel to the New York
State Conference of Mayors
and Municipal Officials
119 Washington Avenue
Albany, New York 12210
(518) 463-1185

July 16, 1993

No. 92-1402

Supreme Court, U.S.
FILED
JUL 15 1993
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT, APPELLATE DIVISION,
SECOND DEPARTMENT OF THE
STATE OF NEW YORK

BRIEF FOR *AMICUS CURIAE* NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION IN SUPPORT OF PETITIONERS

Bruce J. Parker, Esquire
NATIONAL SOLID WASTES
MANAGEMENT ASSOCIATION
1730 Rhode Island Ave., N.W.
Suite 1000
Washington, D.C. 20036
(202) 659-4613

Bruce L. Thall, Esquire
Counsel of Record
ABRAMSON, FREEDMAN &
THALL
2128 Locust Street
Philadelphia, PA 19103
(215) 545-2400
Counsel for Amicus Curiae

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
I. INTEREST OF THE *AMICUS CURIAE*	1
II. SUMMARY OF ARGUMENT.....	2
III. ARGUMENT	4
A. FLOW CONTROL RESULTS IN THE INEFFICIENT AND ENVIRONMENTALLY UNSOUND DISPOSAL OF OUR NATION'S WASTE.....	4
B. LOGIC AND THIS COURT'S PRECEDENTS SUGGEST THAT FLOW CONTROL IS UNCONSTITUTIONAL.....	11
C. THE DEFINITION OF COMMERCE FOR CONSTITUTIONAL PURPOSES IS THE SAME FOR THIS COURT AS IT IS FOR THE CONGRESS	13
D. FLOW CONTROL OBLITERATES COMMERCE	15
E. FLOW CONTROL UNDERMINES THE PURPOSE SERVED BY THE COMMERCE CLAUSE.....	22
F. IN COMMERCE CLAUSE CASES, THIS COURT HAS STRUCK DOWN THE JUSTIFICATIONS USED TO SUPPORT FLOW CONTROL	25
IV. CONCLUSION	30

TABLE OF CITATIONS

Cases: Page

Chemical Waste Management, Inc. v. Hunt, 504 U.S. ____, 112 S.Ct. 2009 (1992) ..... *passim*

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) ..... *passim*

Containers Corp. of Carolina v. Mecklenburg County, No. 92 CV-154-MV Slip.Op. at 4 (W.D. N.C. June 14, 1992) 7

Dean Milk Co. v. Madison, 340 U.S. 349 (1951) 24

Diamond Waste, Inc. v. Monroe County, GA, 796 F.Supp. 1511 (M.D. Ga. 1992) 20, 21

Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977) . 26

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 18

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Nat. Res., 504 U.S. ____, 112 S.Ct. 2019 (1992) ..... *passim*

Foster Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) 26

F.T.C. v. Ticor Title Ins. Co., ____ U.S. ____, 112 S.Ct. 2169 (1992) 17

Geer v. Connecticut, 161 U.S. 519 (1896) 26

Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824) 13

Goldfarb v. Virginia State Bar, 421 U.S. 657 (1975) 15, 16, 17

Government Suppliers Consolidating Serv. v. Bayh, 975 F.2d 1267 (7th Cir. 1992), *cert. denied,* ____ U.S. ____, 113 S.Ct. 975 (1993) 12

H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949) 22, 26, 27

TABLE OF CITATIONS – *(Continued)*

Cases: Page

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 13

Hughes v. Oklahoma, 441 U.S. 322 (1979) 12, 14, 26, 28

J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection, 857 F.2d 913 (3rd Cir. 1988) 7

J.P. Mascaro & Sons, Inc. v. Wm. J. O'Hara, Inc., 565 F.2d 264 (3rd Cir. 1977) 18

Katzenbach v. McClung, 379 U.S. 294 (1964) 13

Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) 15

McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 231 (1980) 16, 17, 18

Missouri v. Holland, 252 U.S. 416 (1920) 26

New York v. United States, 504 U.S. ____, 112 S.Ct. 2408 (1992) 6

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 26

Pfizer, Inc. v. Gov. of India, 434 U.S. 304 (1978), *reh. den.,* 435 U.S. 910 (1979) 12

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) ... 23, 27, 28

Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1977) 22

Quill Corp. v. North Dakota, ____ U.S. ____, 112 S.Ct. 1904 (1992) 13

South-Central Timer Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) 26

Summit Health, Ltd. v. Pinhas, ____ U.S. ____, 111 S.Ct. 1842 (1991) 17

Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) 26

Cases: Page

Toomer v. Whitsell, 334 U.S. 385 (1948) 26

United States v. Georgia Waste Systems, Inc. 731 F.2d 1580 (11th Cir. 1984)..... 19

Waste Recycling, Inc., et al. v. Southeast Alabama Solid Waste Disposal Authority, 814 F.Supp. 1566 (M.D. Ala. 1993) 12

Waste Systems Corp. v. County of Martin, Minn., 985 F.2d 1381 (8th Cir. 1993).....7, 12

West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) ... 26

Western Waste Service Systems v. Universal Waste Control, 616 F.2d 1094 (9th Cir. 1980)..... 19, 20

Statutes:

42 U.S.C.A. §2000, *et seq.*..... 13

42 U.S.C.A. §6901, *et seq.*..... 5

42 U.S.C.A. §6901(a)(4) 5

42 U.S.C.A. §6901(c)..... 5

42 U.S.C.A. §6902..... 5

42 U.S.C.A. §6941(a)(2) 5

Ohio Rev. Code Ann. §343.01(I)(2)..... 10

Other Authorities:

U.S. Constitution, Article I, Section 8, Clause 3 22

Tribe, Lawrence N, American Constitutional Law (1988) 13

Interstate Transportation of Solid Waste: Hearings Before the Subcomm. On Transportation And Hazardous Materials Of The House Comm. On Energy And Commerce, 102nd Cong., 1st Sess. 263 (1991)..... 5

United States Environmental Protection Agency, Characterization Of Municipal Solid Waste In The United States: 1990 Update, Executive Summary (1990) 4

Other Authorities: Page

National Solid Wastes Management Association, The Effects Of Designation And District Fees On Solid Waste Management In Ohio (1993)..... 6, 7

Flow Control and the Cost to Taxpayers (1993) 7

I. INTEREST OF THE *AMICUS CURIAE*

National Solid Wastes Management Association ("NSWMA") is a not-for-profit trade association whose 2700 member companies are engaged in the full spectrum of waste management services. NSWMA's members include collectors and transporters of solid waste, operators of solid waste treatment, storage, and disposal facilities, waste recyclers and remanufacturers, manufacturers and distributors of waste management equipment, and firms providing legal, financial, and consulting services to the waste management industry. Most of these entities participate in one way or another in the movement of waste in interstate commerce.

NSWMA represents the interests of the waste management industry in judicial, legislative, and administrative forums. State and local efforts to prevent the natural and economic movement of waste, whether for storage, treatment, disposal, or recycling, threaten the health of this industry. An increasingly common means to restrict the movement of solid waste is through flow control. "Flow control" is a short-hand reference to requirements imposed by state and local governments that municipal solid waste ("MSW") generated within or imported into its jurisdiction be sent to a designated facility for treatment or disposal. These facilities may include landfills, materials recovery facilities ("MFRs"), waste-to-energy ("WTE") plants, recycling facilities, transfer stations, or composting facilities. Flow control and "waste designation" are interchangeable terms. Because flow control obstructs the natural movement of solid waste, NSWMA's members are directly and adversely affected by flow control. Accordingly, they have a strong interest in presenting their views on the constitutionality of flow control.

Flow control jeopardizes the industries relying upon remanufacturing, hauling, treatment, and landfilling by denying to them the very materials they need to survive in some instances, or, at a minimum, to continue to meet the costs of complying with ever more demanding federal and state mandated environmental protection standards.

Thus, the interests of NSWMA are far broader than those posed by review of the flow control ordinance of the Town of

Clarkstown as applied to petitioners. Petitioners had transported for disposal out-of-state all wastes which they had received. They were barred from business, by operation of respondent's statute mandating that all the waste be processed in-state at the transfer station that respondent had designated. Petitioners' business clearly constitutes and is part of interstate commerce. NSWMA's members, however, do not always transport to or receive from out-of-state the solid waste and its components which are their life blood.

The purpose of this Amicus Curiae Brief is to establish that flow control of solid waste per force is in tension with and contrary to the dormant Commerce Clause, even were the flow control artfully drafted to adversely, albeit equally, affect most in-state and all out-of-state waste management service providers or were each provider physically located within the same state as the entity imposing flow control. This conclusion is premised upon the application of clear and longstanding precedents of this Court to the factual reality that in this day and age there is only commerce in solid waste, and not two separate subsets of commerce distinguished by whether a precise transaction at issue happens to involve a crossing of a state line.

II. SUMMARY OF ARGUMENT

Solid waste is part of the circle of commerce, beginning with the raw materials which are harvested, mined, and manufactured into articles which are in commerce, and which are thereafter discarded, sorted, recycled, and finally remanufactured yet again, regardless of whether each consecutive stopping point along the circle is serendiptiously located in different states. The collectors and transporters of solid waste, operators of waste treatment, storage, and disposal facilities, recyclers and remanufacturers are themselves not only participants in this circle of commerce, but also purchase, sell, transport, and finance in interstate commerce, and affect interstate commerce. Thus, solid wastes and those persons who rely upon it for their livelihoods are both "in" and "affecting" commerce, regardless of whether each person's hauling, disposal, or remanufacture falls solely within a single state.

Flow control cuts off this circle of commerce by imposing embargoes on solid waste so that it is retained only by a specific geographical entity; or by decreeing specific and limited resting places for the waste and its components, within specific geographical entities; or by taxing the waste either on export beyond the generating locality or on transport to undesignated facilities. By definition, flow control is economic protectionism.

Given the circle of commerce, no logic permits flow control to withstand Commerce Clause analysis, whether the flow control blocks commerce at town, city, or state borders.

When coupled with the findings of this Court, Congress, and the Executive Branch respecting the national crisis in waste disposal and emphasis upon recycling and remanufacturing of articles from solid waste, any flow control restriction breaking the circle of commerce violates the Commerce Clause. Such restrictions run afoul of the broad purposes served by the Commerce Clause, enunciated repeatedly in this Court's opinions involving commerce, including solid wastes, because flow control is both contrary to the core principle that our economic unit is the nation, and constitutes proscribed economic protectionism. In this regard, flow control is really nothing more than a derivative of the first generation of state enactments restricting the importation of solid wastes across state and local borders, which restrictions uniformly have been struck down by this Court. The sole distinction between the first generation and second generation of restrictions is that now the states and localities use flow control to retain for themselves their solid wastes instead of precluding the entry of solid wastes. This distinction is of no constitutional significance.

Flow control cannot stand when measured against those cases in which this Court has struck down export embargoes on Commerce Clause grounds, for a state or one of its political subdivisions may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the state, rather than through the state itself.

This Court previously has announced the principles necessary to decree flow control unconstitutional regardless of whether the blockage is at state boundaries. This Court has

interpreted most expansively the boundaries of federal power granted through the Commerce Clause to provide a basis for this Court's scrutiny of activities primarily and almost exclusively local in nature. This Court has repeatedly decreed that this broad encompassing of articles and activities implicating the Commerce Clause is equally expansive whether the Clause is applied to measure the constitutionality of federal statutory enactments or the validity of state and local laws. The "epoxy function" performed by the Commerce Clause and the monetary and environmental consequence of the circle of commerce in solid wastes to the national economy, health, and welfare are stymied by flow control which, as economic protectionism, is contrary to the core Commerce Clause principles which this Court has enunciated.

Application of these principles to the circle of commerce in solid wastes compels the conclusion that flow control violates the dormant Commerce Clause. A fortiorari it is respectfully submitted that petitioners must prevail in the above-referenced action.

III. ARGUMENT

A. *FLOW CONTROL RESULTS IN THE INEFFICIENT AND ENVIRONMENTALLY UNSOUND DISPOSAL OF OUR NATION'S WASTE*

Although NSWMA recognizes that the Court's decision in this case will turn upon the governing legal principles, state and local flow control measures such as that here at issue do not exist in a vacuum. Waste disposal is subject to regulation under both federal and state law, and the policies which underlie those regulatory schemes provide the background against which flow control should be evaluated. Accordingly, before addressing the applicable legal principals, NSWMA must discuss this background.

According to the Environmental Protection Agency, the United States generated 180 million tons of municipal solid waste in 1988. United States Environmental Protection Agency ("EPA"), The Solid Waste Dilemma: An Agenda For Action at 6

(1989). Fifteen million tons of solid waste move across state borders each year. See Interstate Transportation of Solid Waste: Hearings Before The Subcomm. On Transportation And Hazardous Materials Of The House Comm. On Energy And Commerce, 102nd Cong., 1st. Sess. 263 (1991) (Statement of Allen Moore, President, National Solid Wastes Management Association). All of it must be used or disposed. The EPA concluded that in 1988, more than half of the solid waste could be re-used: 40% of it was paper and paperboard; 8.5% was metals; 8% plastics; and 7% glass. United States Environmental Protection Agency, Characterization Of Municipal Solid Waste In The United States: 1990 Update, Executive Summary at ES-5 (1990). Yet, in 1988, only 13.1% of the 180 million tons of municipal solid waste were actually recovered. *Id.*, at ES-6, n.9.

To meet what Chief Justice Rehnquist has termed the "growing problem in our nation" regarding the sanitary treatment and disposal of solid waste [*City of Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (dissenting opinion)], Congress passed the Resource Conservation and Recovery Act, 42 U.S.C.A. §6901, *et seq*, which, after declaring that "problems in waste disposal . . . have become a matter of national concern" [42 U.S.C.A. §6901(a) (4)], found that municipal and solid wastes contain valuable material resources that can be reused, thereby conserving increasingly scarce virgin material, using available methods to recover millions of tons of reusable materials now needlessly buried each year. 42 U.S.C.A. §§6941(a) (2) & (3), 6901(c), 6902. These declarations of Congressional findings and objectives, spurred by financial assistance to those states adopting waste disposal plans including provisions for substantial reuse and recovery of materials from wastes, have spawned the growth of entire industries based solely on the transporting, remanufacturing, and marketing of newsprint and paper products, cans, glass, plastic, metals, and other materials obtained from wastes which had previously been buried or incinerated.

At the same time, the Act precluded the use of open dumps to dispose of wastes and instead compelled that landfills adhere to strict standards designed to ensure environmental safety, including the use of multiple layers of liners, leachate control systems, and engineering safeguards.

Although these strict standards significantly diminish environmental degradation caused by burial of solid wastes, they also change the economics of landfilling. These high technology landfills cost as much as $1 million per acre to construct. National Solid Wastes Management Association, The Effects Of Designation And District Fees On Solid Waste Management In Ohio at 3 (1993) (hereinafter "Ohio Report"). This simple economic reality has compelled the construction of larger landfills serving wider areas, in order to spread the huge costs of construction and compliance with ever more demanding federal and state regulations over an increased volume, thereby maintaining a reasonable and competitive fee for disposal of solid waste.

At the same time, geology, population pressures, zoning restrictions, limited local disposal capacities, and the development of low cost means to transport solid wastes over long distances have made it both necessary and economically feasible for many localities to dispose of their solid wastes in far distant communities, a phenomenon with which this Court is quite familiar, having recently dealt with cases raising this common practice. *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dept. of Natural Resources,* 504 U.S. ____, 112 S.Ct. 2019 (1992); *Chemical Waste Management, Inc. v. Hunt,* 504 U.S. ____, 112 S.Ct. 2009 (1992).[1] Flow control is antithetical to these basic economic and environmental realities.

The driving force behind flow control is economic protectionism – a means of guaranteeing that waste disposal or processing facilities will receive sufficient solid waste to cover the costs of construction, operation and debt service, thus protecting a facility from competition with other economically and environmentally protective waste management options.

1. Indeed, this Court decided three cases during the term ending in June of 1992 involving waste disposal issues: *Fort Gratiot; Chemical Waste Management;* and *New York v. United States,* 504 U.S. ____, 112 S.Ct. 2408 (1992). This fact alone eloquently establishes this Court's recognition that waste generation and disposal are issues of paramount national concern.

Flow control is economically inefficient. It substitutes an extremely competitive waste services collection and disposal system with monopoly public regulations resulting in higher disposal costs. Flow control is really a hidden business tax because it subsidizes designated facilities with a guaranteed customer base thereby eliminating the incentives for cost control and fiscal accountability.

A recent study by a New York State public interest group found that at least 22 of New York's 62 counties have flow control, costing the residents in these counties 54% more to dispose of a ton of garbage than their neighbors in open-market counties. Flow costs, "Flow Control And The Cost To New York Taxpayers" (1993). Consider the following difference between free market prices and flow control prices as described in recent flow control litigation. *Waste Systems Corp. v. County of Martin, Minn.,* 985 F.2d 1381, 1387 (8th Cir. 1993) (flow controlled disposal cost $72 per ton vs. $30 per ton at a competitive facility); *J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection,* 857 F.2d 913, 916 (3rd Cir. 1988) (flow controlled disposal cost $100 per ton vs. "approximately half" that of a competitive facility; *Containers Corp. of Carolina v. Mecklenburg County,* No. 92 CV-154-MV, Slip.Op. at 4 (W.D.N.C. June 14, 1992) (flow controlled disposal cost $37.50 per ton vs. $29.50 per ton at a competitive facility.

Flow control does not *ipso facto* result in the disposal of waste in a state-of-the-art, environmentally safe facility. Indeed, the case at bar is a ready example. The Town of Clarkstown enacted a flow control ordinance to support the operation of a transfer station which simply prepares waste for shipment to ultimate, permanent disposal facilities.

The NSWMA "Ohio Report" reveals that designation deprived waste generators of access to Best Available Technology ("BAT") landfills, even when these generators had previously used BAT facilities for disposal. Amazingly, 20 districts whose generators used a BAT landfill in 1991 failed to designate any BAT landfill in 1993, resulting in tens of thousands of tons of wastes being disposed of in facilities that are not "state-of-the-art". Ohio Report at 5.

Flow control may deny waste generators their preferred disposal facilities offering greater levels of service or environmental protection. Why is this important? Waste generators are responsible for ensuring proper management of their wastes, and they are liable for improper disposal. The legacy of problems from poorly constructed landfills of the past spurred not only modern engineering standards for solid waste landfills, but also efforts to supplement these standards or to go beyond them through extra design features and special waste-handling procedures. While the evolution toward state-of-the-art landfills is under way throughout the United States, some landfill owners and operators are already discovering markets in extra, add-on-services – special procedures for placement of wastes, monitoring of incoming truckloads of waste, and the like. Some landfills are being built to a higher level of environmental protection than current regulations require.

Long-term fear of liability is driving this market, creating a demand for specialization even among today's highly engineered landfills. While statistics are lacking on the extent of this demand, an example of the degree of concern is that some United States industrial waste generators send their non-hazardous wastes to hazardous waste facilities, paying a high premium, rather than to municipal landfills qualified to take the wastes, simply for peace of mind. Flow control eliminates this option.

Generators may want their wastes disposed at one or two facilities in order to minimize their potential Superfund liability. Under Superfund, a generator assumes potential liability for the entire clean-up at any disposal facility it uses if that site becomes polluted. Confining wastes to a single landfill is one strategy to reduce this long-term risk. Flow control hampers this risk reduction strategy.

In fact, most generators today – municipalities, businesses, institutions, industrial facilities – use various criteria to select appropriate landfills. Disposal charges (including taxes on top of the gate fees), environmentally protective features, allocation of risk, special operating or waste-handling procedures, proximity, and other factors play a role in the selection. Flow control interferes with the search for specialization.

Flow control also interferes with the rational, economic forces driving the market in solid wastes. After all, solid waste is an article of value. The newsprint, paper products, cardboard, plastic, aluminum, glass, and other constituent components of solid waste, whether separated after use, hauling, or upon disposal, each have value. The reuse and recovery of these components, encouraged by federal law, has increased the availability of sufficient, accessible quantities of these components. Entire industries have sprung up based solely upon the gathering, remanufacturing, and marketing of reused and recycled components of solid waste. None of these lines of commerce are naturally restricted by artificially created geographic boundaries. Indeed, market boundaries are a function of supply, demand, and technology. Thus, today's Washington Post, printed in Virginia, mailed to a subscriber in New Jersey, discarded in New York, and then separated and shipped to Massachusetts for remanufacture into newsprint, is purchased to print next month's editions of the Washington Post. This describes more than a stream of commerce – indeed, it represents a circle of commerce. There is no logic which justifies the erection of a flow control barrier to break this circle.

In spite of the ill effects of flow control, at least 29 states now expressly grant localities or state agencies the authority to adopt flow control regulations. Thus flow control has become an integral part of the regulation of solid wastes. Whereas last term this Court reaffirmed its decision in *City of Philadelphia* by striking down as "economic protectionism" two state statutory schemes restricting the importation of wastes across state and local lines in *Fort Gratiot, supra,* and *Chemical Waste Management, supra,* flow control is nothing more than attempts by states and local governments to capture additional revenues by unlawfully prohibiting the exportation of wastes across the same lines.

Whether justified by recourse to long term planning needs, assurance of raw materials for local facilities or other claimed bases, the fact remains that flow control constitutes economic protectionism, already proscribed by this Court as an "evil" whether it is the legislature's means or end. *City of Philadelphia, supra,* 437 U.S. at 624.

By focusing on Ohio's implementation of flow control, the economic inefficiencies and environmental detriments become dramatically apparent. Flow control in Ohio is implemented by 48 single or multi-county solid waste districts, each of which has the power and duty to designate solid waste transfer, recycling and disposal facilities. Upon designation, "no person shall deliver . . . any solid wastes generated within a . . . district to any solid waste . . . facility other than the facility designated in the solid waste management plan . . ." approved by the Ohio EPA. [Ohio Rev. Code Ann. §343.01(I)(2).] Pursuant to this flow control statute, the Solid Waste Authority of Central Ohio ("SWACO"), which includes the State Capital, Columbus, has enacted resolutions withholding designation of any out-of-district facilities, thereby compelling disposal of in-district generated solid waste at the landfill and incinerator located within the district. Contemporaneously, SWACO took over the operation of the incinerator, so that the Authority now owns and operates the sole waste disposal facilities remaining within the district. Not surprisingly, in the 3 months since the takeover by SWACO, the disposal fees at the incinerator and landfill have increased by 80%. Other disposal facilities are available in adjacent counties. Although each facility is state-of-the-art, and the disposal fees each charged were less than those charged by SWACO even before the 80% increase, no such facility was designated by SWACO.

Thus far, flow control in Ohio has drastically reduced commerce in solid wastes. In 1991, before designation, 3.7 million tons of Ohio generated wastes were disposed in districts other than the districts in which they were generated. In early 1993, after two-thirds of the district plans had been approved by the Ohio EPA, the number of inter-district movements of wastes had been cut by more than 75%. Ohio Report at 4. In 1991, a landfill located in the Logan District received wastes from generators in 20 distinct districts; yet, only 9 of the districts had designated this landfill in 1993. *Id.*[2] Eighteen districts have

2. This diminution is at some cost to the environment. Designation does not compel that the authority designate the best available technology landfill. Indeed, as previously stated, 20 districts whose generators had utilized a best available technology landfill in 1991 failed to designate any best available technology landfill in 1993. *Id.*, at 5.

designated only a single landfill. *Id.*, at 6. Should that landfill cease operation even for a day, no wastes may be lawfully disposed at any other facility.

Forcing a waste transporter or generator to dispose of waste at a designated facility, in a planning area where there are a number of facilities from which to choose, is no different from forcing a private business to rent office space in a building selected by a city, or a doctor to send patients to a hospital chosen by a municipality. Thus, it is no wonder that such a significant obstruction to interstate commerce runs afoul of this Court's Commerce Clause jurisprudence, as we now show.

B. LOGIC AND THIS COURT'S PRECEDENTS SUGGEST THAT FLOW CONTROL IS UNCONSTITUTIONAL

One might think that this Court itself has dealt the death knell to flow control, whether based on state or local enactments barring export within or beyond state lines. After all, *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, 504 U.S. ____, 112 S.Ct. 2019 (1992), held unconstitutional a Michigan statute which precluded the in-county disposal of out-of-county and/or out-of-state generated solid wastes absent affirmative authorization by that County's Waste Management Plan, precisely because the waste import restrictions enabled each of Michigan's 83 counties "to isolate itself from the national economy." *Id.*, 112 S.Ct. at 2024. This Court found it made no difference that the Michigan enactment treated interstate and intrastate commerce even-handedly:

> "For . . . a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself."

Id., 112 S.Ct. at 2024.

This Court subjected the Michigan enactment to strict scrutiny Commerce Clause analysis and, because the State could not identify any reason, apart from origin, to support the differential treatment of in-county versus out-of-county generated wastes, this Court deemed the statute facially violative of the Commerce Clause.

Obviously, neither this Court's language nor its rationale were restricted to devices affecting only the importation of solid wastes. Moreover, since this Court has held that federal statutes based upon the Commerce Clause, such as the anti-trust laws, as well as the Commerce Clause itself, reach exports as well as imports and to the same extent [*Pfizer, Inc. v. Gov. of India,* 434 U.S. 304 (1978), *reh. den.*, 435 U.S. 910 (1979); *Hughes v. Oklahoma,* 441 U.S. 322 (1979)], it would seem that the flow control death certificate need only be formally signed.

Not surprisingly, those federal courts which have considered whether *Fort Gratiot* strikes down state and local attempts to restrict the out-flow of solid wastes have deemed *Fort Gratiot* dispositive. *E.g., Waste Systems Corp. v. County of Martin, Minn.*, 985 F.2d 1381, 1386 (8th Cir. 1993); *Government Suppliers Consolidating Serv. v. Bayh,* 975 F.2d 1267, 1277 n.8 (7th Cir. 1992), *cert. denied,* ____ U.S. ____, 113 S.Ct. 975 (1993); *Waste Recycling, Inc., et al. v. Southeast Alabama Solid Waste Disposal Authority,* 814 F.Supp. 1566 (M.D. Ala. 1993).

Yet, respondent persists in perpetuating the unfounded notion that, despite *Fort Gratiot,* its ordinance precluding exportation of solid wastes beyond Township lines is somehow immune from Commerce Clause scrutiny. As set forth above, the development of entire industries based upon the collection and use of reusable and recyclable materials and the remanufacturing of them into components which are, themselves, articles in commerce, factually precludes localities from erecting an artificial wall to hoard the solid waste or its components for itself. When coupled with the regional and national markets for disposal of waste [*Fort Gratiot, supra,* 112 S.Ct. at 2023], it is transparently obvious that flow control necessarily impacts negatively on commerce, be that commerce defined as the solid

waste itself, its constituent elements, or the purchase of transportation or disposal services for solid waste. The law eradicating the underpinnings for the respondent's contention is set forth below.

C. THE DEFINITION OF COMMERCE FOR CONSTITUTIONAL PURPOSES IS THE SAME FOR THIS COURT AS IT IS FOR THE CONGRESS

As this Court has noted, the framers intended the Commerce Clause to cure the suppression of interstate commerce occurring under the Articles of Confederation. *Quill Corp. v. North Dakota,* ____ U.S. ____, 112 S.Ct. 1904, 1913 (1992). The Clause has been fairly characterized as "the Constitution's primary epoxy of national cohesion". Tribe, Lawrence N, American Constitutional Law (1988). This epoxy function is long standing.

In *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1 (1824), striking down New York's grant of an exclusive steamboat monopoly for navigation in New York waters, Chief Justice Marshall gave a broad reading to commerce under the Commerce Clause, concluding that the only commercial activities immune from federal power, and reserved for state or local regulation, were those "which are completely within a State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Id.*, 22 U.S. (9 Wheat) at 194. Justice Marshall's broad view of commerce under the Commerce Clause was the basis for this Court's upholding the constitutionality of Title II of the Civil Rights Act, 42 U.S.C.A. §2000, *et seq,* precluding unequal enjoyment of places of public accommodation on the basis of race, color, religion, or national origin. *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241 (1964) (since places of public accommodation use products which have moved in interstate commerce, the statute is within the Commerce Clause power). Similarly, in *Katzenbach v. McClung,* 379 U.S. 294 (1964), this Court applied Title II to "Ollie's Barbecue", a family owned restaurant in Birmingham, Alabama, because Ollie's had purchased meat from a supplier who had received it from out-of-state sources.

Thus, Chief Justice Marshall's view that the Commerce Clause contains an extraordinarily broad definition of commerce, reaching matters otherwise deemed local in nature, remains the law of the land.

This Court has determined that the same extraordinarily broad definition of commerce adheres to its decisions under the dormant Commerce Clause. *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978), which held that solid wastes, excluding recyclables, were articles of commerce, also established that this Court's definition of commerce under the dormant Commerce Clause is no narrower than that of Congress in enacting legislation based upon that Clause. Before striking down New Jersey laws banning importation of solid and liquid wastes generated outside of the State (excluding from the ban separated waste materials intended for recycling), this Court noted that the New Jersey Supreme Court had expressed the view that there may be two definitions of commerce for constitutional purposes; a very sweeping concept of commerce when relied upon to support exertion of federal control or regulation, and a much more confined concept when used by the Courts to restrict state legislation. In rebuking this notion, this Court stated:

> "We think the State Court misread our cases, and thus erred in assuming that they require a two-tiered definition of commerce."

City of Philadelphia, supra, 437 U.S. at 622. Similarly, in *Hughes v. Oklahoma,* 441 U.S. 322 (1979), which struck down on Commerce Clause grounds a state regulation restricting export of minnows, this Court yet again stated that there is but one definition of commerce, whether applied to federal enactments or the Court's utilization of its dormant powers:

> "*Philadelphia v. New Jersey,* 437 U.S. 617, 621-623 (1978), made clear that there is no 'two-tiered definition of commerce.' The definition of 'commerce' is the same when relied on to strike down or restrict state legislation as when relied on to support the exertion of federal control or regulation."

Hughes, supra, 441 U.S. at 326 n.2.

Thus, whether dealing with solid wastes, minnows, or banking and related financial activities, which this Court has conceded are of "profound local concern" [*Lewis v. BT Inv. Managers, Inc.,* 447 U.S. 27, 38 (1980)], this Court has relied upon the broad expanse of the definition of commerce equally applicable to measure federal legislation and state enactments. Although burdens of persuasion and legislative presumptions may differ depending upon whether a federal or state statute is being reviewed, there can be no question but that the breadth of commerce subject to review pursuant to the Commerce Clause is identical, and includes acts, practices and articles which are in and of themselves profoundly local, but which are a part of a larger whole.

Since that power extends to Ollie's Barbecue and solid waste from which recyclables have been mined, a *fortiorari* the power extends to enactments barring the exportation of solid wastes, with or without its component parts, whether from states or geographic entities subsumed within them.

D. FLOW CONTROL OBLITERATES COMMERCE

There can be no doubt but that flow control, whether it is required or permitted by state law, and/or created or implemented by some locality, affects the stream of commerce. In *Goldfarb v. Virginia State Bar,* 421 U.S. 657 (1975), holding unconstitutional a minimum fee schedule for lawyer services in connection with local real estate sales, this Court had to first determine whether the challenged conduct affected interstate commerce, thereby falling within the jurisdiction of the Sherman Act, even though the legal services were performed wholly intrastate and were local in nature.

Because a significant portion of funds furnished for the purchasing of homes came from out-of-state, because loans on real estate were guaranteed by, among others, agencies of the United States, and because the services provided were a necessary component of the entire transaction, this Court found that the fee schedule was in the stream of interstate commerce:

> "The necessary connection between the interstate transactions and the restraint of trade provided by the

> minimum-fee schedule is present because, in a practical sense, title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower. In financing realty purchases lenders require, 'as a condition of making a loan, that the title to the property involved be examined. . . .' Thus a title examination is an integral part of an interstate transaction . . ."

Goldfarb, supra, 421 U.S. at 784.

Thus, in view of the volume of commerce involved and "the inseparability" of title examinations and searches from the interstate aspects of real estate transactions, this Court concluded that interstate commerce had been sufficiently affected. *Goldfarb, supra,* 421 U.S. at 785.

In *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 231 (1980), vacating and remanding the dismissal of a civil Sherman Act complaint, plaintiffs had alleged a price-fixing conspiracy effectuated through an agreement to conform to a fixed rate of brokerage commissions on sales of residential property. Defendants had moved to dismiss, averring that the activities were local in nature and did not have a substantial effect on interstate commerce.

Based upon *Goldfarb,* the *McLain* Court determined that Sherman Act jurisdiction existed because, even were the brokerage activities local in nature, they had an effect on other appreciable activity demonstrably in interstate commerce, such as out-of-state purchasers and/or mortgage financing:

> "The facts of *Goldfarb* revealed an application of the State Bar Association's minimum-fee schedule to fix fees for attorneys' title examination services. Since the financing depended on a valid and insured title we concluded that title examination was 'an integral part' of the interstate transaction of obtaining financing for the purchase of residential property and, because of the 'inseparability' of the attorneys' services from the title examination process, we held that the legal services were in turn an 'integral part of an interstate transaction.' 421 U.S. at 784-785. By placing the *Goldfarb* holding on the available ground that the activities of the attorneys were within the stream of interstate commerce, Sherman Act jurisdiction was established. The *Goldfarb* holding was not addressed to the 'effect on commerce' test of jurisdiction and in no way restricted it to those challenged activities that have an integral relationship to an activity in interstate commerce."

McLain, supra, 444 U.S. at 244. Reducing it to "a matter of practical economics", *McLain* concluded that the alleged price fixing "necessarily affected both the frequency and terms of residential sales transaction", thus being both in and affecting commerce:

> "Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce."

McLain, supra, 444 U.S. at 246.

In *F.T.C. v. Ticor Title Ins. Co.*, ____ U.S. ____, 112 S.Ct. 2169 (1992), no party even questioned whether an agreement to set fees for local title searches, examinations, and settlements affected commerce within the meaning of 15 U.S.C.A. §45(a)(1), supported by the Commerce Clause. Rather, the issue posed was whether the defendants had been conferred anti-trust immunity by the states.

In *Summit Health, Ltd. v. Pinhas,* ____ U.S. ____, 111 S.Ct. 1842 (1991), in which this Court held that a conspiracy to deprive a surgeon/opthamologist of operating privileges at a local hospital affected commerce because (1) some of the procedures were performed on out-of-state residents; (2) some of the revenues generated from the procedures came from out-of-state; and (3) some of the medications and supplies were purchased from out-of-state, no justice questioned whether the Commerce

Clause permitted Congress to reach such conduct; rather, the sole question was whether the Sherman Act had done so. *Id.*, at 1849.[3]

The cases that address the collection and disposal of solid wastes disclose the same Commerce Clause analysis. For example, in *J.P. Mascaro & Sons, Inc. v. Wm. J. O'Hara, Inc., et al.*, 565 F.2d 264 (3rd Cir. 1977), decided prior to *McLain*, the Third Circuit found jurisdiction over a private antitrust action due to the effect on commerce. Plaintiff claimed that defendants had conspired to exclude plaintiff trash hauler from a wholly intrastate market surrounding Philadelphia, Pennsylvania. At critical times, plaintiff had purchased equipment and supplies manufactured outside of its home state; paid out-of-state insurers substantial sums in premiums; and borrowed money from out-of-state lending institutions to finance its equipment purchasers. Several of Mascaro's customers paid for Mascaro's services through checks drawn from home offices located outside Pennsylvania. The Third Circuit found the proscribed effect on interstate commerce a matter of economic reality:

> "When the issue scrutinized is the effect on interstate commerce in an anti-trust context, economic reality must be the criterion. For example, to argue that commerce in interstate trucks is affected when the vehicles are shipped directly to the customer from the factory but not when they are purchased from the local dealer is economically unsound. . . . Here, it appears that the only local connection with the suppliers is the intervention of the vendor. That is not enough to stop the financial waves – not mere ripples

3. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) is not to the contrary. The Court there found that the Maryland statute barring ownership of both refineries and gas stations did not discriminate against commerce because it had "no demonstrable" effect on either the amount of the interstate commerce flowing into the state or the relative portions of local or out-of-state goods sold in-state. Id., at 126 and n.16. The statute affected only the structure of doing business in the state. Flow control demonstrably affects both the amount of interstate commerce and the portions of local and out-of-state goods sold in-state.

> – washing back in the stream of commerce to the out-of-state manufacturers."

Mascaro, supra, 565 F.2d at 268-269.[4]

In *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094 (9th Cir. 1980), decided shortly after *McLain*, the Ninth Circuit vacated and remanded an action that had been dismissed for lack of subject matter jurisdiction under the Commerce Clause. Plaintiff had been engaged in the waste disposal business in the metropolitan Phoenix area, in competition with that of defendant. Plaintiff contended that defendant attempted to monopolize the waste disposal business through providing disposal services at prices substantially below cost.

The Court determined that each party acquired a substantial amount of its equipment from out-of-state; that some of the waste material collected by defendant "is paper which is hauled to paper brokers in Phoenix for shipment out-of-state"; and that defendant collected scrap wood which is shipped to recyclers, who then "make this material into wood chips which are shipped out-of-state". *Id.*, at 1096.

The Ninth Circuit determined that these facts established "not only that [defendant's] rubbish collection business substantially affected interstate commerce, but also that the alleged antitrust violations substantially affected interstate commerce." *Western Waste, supra*, 616 F.2d at 1097.

Respecting reuse, recycling, and line of commerce, the Ninth Circuit recited:

> "Universal hauls several tons of waste which it collects to paper brokers and recyclers that ship these materials out-of-state. This evidence also demonstrates Universal's effect on interstate commerce as these shipments were the beginning point for a significant line of interstate commerce. If Universal succeeds in its alleged scheme to drive Western Waste out of

4. *Accord, United States v. Georgia Waste Systems, Inc.*, 731 F.2d 1580, 1583 (11th Cir. 1984), affirming Sherman Act convictions for price fixing and customer allocation in local market due to purchases from out-of-state vendors, and receipt and payment of funds from out-of-state.

> business, the number of suppliers from whom the dealers may purchase such scrap materials for out-of-state shipment will diminish. With fewer suppliers in the market, the suppliers of such scrap materials will be able to restrict supply and raise their prices with a concomitant reduction in the interstate commerce of such materials."

Western Waste, supra, 616 F.2d 1098.

Indeed, in deeming inapplicable earlier authority within the Circuit finding no Sherman Act jurisdiction arising from wholly local garbage disposal and container leasing businesses, supplied with equipment from out-of-state, *Western Waste* expressly relied upon the reuse and recycling which defendant undertook:

> "Universal hauls several tons of the waste which it collects to scrap dealers and paper brokers which ship these materials out-of-state."

Western Waste, supra, 616 F.2d at 1098.

Thus, whether viewed as the inception of a new line of commerce, or continuation of an old line of commerce, the chips, scraps, and other materials which constitute recyclables from solid wastes are in interstate commerce. They clearly are the building blocks of whole industries whose business is reuse and recycling. Even wholly intrastate collection and disposal of residential and commercial solid wastes are acts which are in the flow of interstate commerce and affect interstate commerce. Moreover, the source separation of residential and commercial wastes into reusable and recyclable components, and the remanufacturing of those waste materials, are both within the stream of interstate commerce and affect interstate commerce. Therefore, any restriction on the flow of this commerce effectuated by a state or locality's flow control presumptively discriminates against interstate commerce.

It should not be surprising that in *Diamond Waste, Inc. v. Monroe County, GA,* 796 F.Supp. 1511 (M.D. Ga. 1992), Chief Judge Owens, one month before *Fort Gratiot* and *Chemical Waste Management,* preliminarily enjoined defendants from

enforcing statutes and county ordinances which, plaintiff had claimed, burdened interstate commerce. The enactments had created a need for two distinct permits, a solid waste permit for disposal of in-state generated solid wastes, and a special solid waste permit for disposal of out-of-state generated solid wastes.

In enjoining enforcement of the special solid waste permit, Chief Judge Owens rebuked the defendant's contentions that the ordinance, applicable only to out-of-state generated wastes, did not implicate the Commerce Clause, by stating:

> "This argument fails for several reasons. First, solid waste disposal is a matter of national concern, . . . Thus, solid waste concerns interstate commerce.
>
> * * *
>
> Second, industries and other entities engaging in interstate commerce have to have a means of solid waste disposal. . . .
>
> * * *
>
> Third, the fact that DWI operates only within the State of Georgia does not mean that DWI is not a part of interstate commerce. . . . DWI primarily functions through contractual arrangements with waste transporters and waste generators. A portion of the waste deposited in the City landfill comes from recycling facilities. A recycling facility . . . collects recyclable materials from within and without Georgia. . . . The facility then processes these materials to separate the usable portion from the unusable . . . portion and disposes of the solid waste portion in the City landfill through a contract with DWI or with a DWI customer. DWI is a vital part of the recycling process."

Diamond Waste, supra, 796 F.Supp. at 1517. After all, Chief Judge Owens' conclusion is squarely based upon this Court's precedent.

E. FLOW CONTROL UNDERMINES THE PURPOSE SERVED BY THE COMMERCE CLAUSE

In the absence of federal legislation governing subjects of potential federal regulation, the subjects are open to control by state enactments so long as the states act within the restraints imposed by the Commerce Clause itself. *City of Philadelphia v. New Jersey,* 437 U.S. 617, 623 (1978); *see, Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429, 440 (1977). The bounds of these restraints imposed by the Commerce Clause upon the state appear nowhere in the words of the Commerce Clause;[5] rather, they have emerged in decisions of this Court which strive to give effect to its basic, broad purpose. *City of Philadelphia, supra,* 437 U.S. at 623. *City of Philadelphia* deemed that broad purpose epitomized by the Opinion of Mr. Justice Jackson for the Court in *H.P. Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 537-538 (1949):

> "This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting custom barriers against foreign competition, has as its corollary that the states are not separable economic units. As the Court said in *Baldwin v. Seelig,* 294 U.S. 511, 527 'what is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.' "

City of Philadelphia, supra, 437 U.S. at 623.

City of Philadelphia noted that two separate tests have arisen under the dormant powers vested in the federal government by force of the Commerce Clause, one to deal with simple economic isolation, and the second to deal with credibly advanced legislative objectives lacking discrimination against interstate trade:

---

5. Article I, Section 8, Clause 3 of the United States Constitution provides, in pertinent part: "The Congress shall have Power . . . to Regulate Commerce . . . among the Several States. . . ."

> "Thus, where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. (Citations omitted.) The clearest example of such legislation is a law that overtly blocks the flow of interstate commerce at a state's borders."

City of Philadelphia, supra, 437 U.S. at 624. Where other legislative objectives are *credibly* advanced, and there is no *patent* discrimination against interstate trade, *City of Philadelphia* acknowledged the adoption by the Court of a more flexible approach, whose general contours were outlined in *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970):

> "Where the statute regulates even handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."

City of Philadelphia, supra, 437 U.S. at 624. Whatever test applies, nonetheless the central core of the dormant Commerce Clause is the preclusion of economic isolation through parochial legislation enacted by the states or their political subdivisions.

Any questions regarding the vitality of the *City of Philadelphia* decision have been dispelled by *Fort Gratiot* and *Chemical Waste Management, supra.*

In *Chemical Waste Management,* which struck down on Commerce Clause grounds an Alabama statute imposing an additional fee on in-state disposal of out-of-state generated waste, this Court expressly relied upon the rationale of *City of Philadelphia,* quoting at length from that Opinion before applying the *per se* test to the State's enactment. In so holding, this Court noted that the defenses advanced by the State: (1)

protection of health and safety; (2) conservation of the environment and natural resources; (3) provision of compensatory revenue to the State; and (4) reduction of flow of wastes travelling on State roads, were separately and together insufficient to overcome the discrimination against interstate commerce. *Chemical Waste Management, supra,* 112 S.Ct. at 2014-2015.

In *Fort Gratiot,* which struck down on Commerce Clause grounds a Michigan statute authorizing each county to preclude the disposal of out-of-state and out-of-county waste, this Court relied upon and quoted extensively from *City of Philadelphia* in applying the *per se* test to the State's facially neutral statute, reasoning that discrimination against commerce in out-of-state generated wastes is not eviscerated by equivalent discrimination against commerce in all out-of-county, but in-state generated wastes, relying on its decision to that effect in *Dean Milk Co. v. Madison,* 340 U.S. 349, 354 (1951):

> "The fact that the [*Dean Milk*] ordinance also discriminated against all Wisconsin producers whose facilities were more than five miles from the center of the city did not mitigate plaintiff's burden on interstate commerce. As we noted, it was immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce.
>
> * * *
>
> [A] State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself."

Fort Gratiot, supra, 112 S.Ct. at 2024.[6]

6. The enactment struck down in *Dean Milk* was not a state statute. Rather, the enactment was a local ordinance passed by the City of Madison, Wisconsin. Thus, this Court makes no distinction between state statutes, local enactments enabled by state statutes, or local ordinances standing alone in analyzing Commerce Clause issues.

Moreover, as with *Chemical Waste Management* and *City of Philadelphia,* the State's assertions of need to conserve landfill disposal capacity, to plan for safe disposal of future wastes, and to protect health and welfare of citizens of the county and State, were deemed insubstantial to defeat the Commerce Clause challenge to Michigan's facially neutral statute.

Thus, the preclusion of economic isolation through state and local enactments remains the fulcrum of dormant Commerce Clause litigation.

F. IN COMMERCE CLAUSE CASES, THIS COURT HAS STRUCK DOWN THE JUSTIFICATIONS USED TO SUPPORT FLOW CONTROL

Just as federal enactments and this Court's opinions concerning disposal and transport of solid wastes rest soundly upon the Commerce Clause, state enactments, such as flow control, cannot exist in a vacuum, but must also be firmly bottomed upon state law. Respecting control over wastes, the state authority has generally been some expansive notion of exercise of the police power, in order to safeguard the health, safety, and welfare of its citizens. This Court has expressly limited the use of the police power in *City of Philadelphia, Fort Gratiot,* and *Chemical Waste Management, supra,* given the absence of any proof that the wastes sought to be regulated are different in kind from those unregulated. In so holding, this Court has properly deemed the protection of the national economy paramount to the states' interests.

The localities seeking to benefit from flow control are clearly claiming no environmental or health degradation from solid waste disposal. Thus, such localities are left with no theoretical framework to justify the erection of a ban or imposition of a tax on exported solid wastes. Some have therefore begun to search for a framework, and have seized upon their "ownership" or "possession" of the solid waste, claiming it has been discarded by its residents of businesses. This claim has been raised, and lost, when measured against the Commerce Clause in other contexts. Its fate should be the same when applied to solid wastes.

In *Geer v. Connecticut*, 161 U.S. 519 (1896), over vigorous dissents of the first Justice Harlan and Justice Field, this Court sustained a Commerce Clause challenge against a Connecticut statute forbidding the transportation beyond the state of game birds lawfully killed within the state. The *Geer* Court reasoned that no interstate commerce was involved because the state, as representative of its citizens, owned the wild game so that it could qualify the ownership by precluding its removal:

> "The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose."

Geer, supra, 161 U.S. at 530. Justices Field and Harlan dissented, viewing that upon an animal being killed for purposes of food or other uses of man "it becomes an article of commerce, and its use cannot be limited to the citizens of one State to the exclusion of citizens of another State." *Id.*, at 609-610.

The view of the *Geer* dissenters became the law rather quickly. *West v. Kansas Natural Gas Co.*, 221 U.S. 229, 255-256 (1911); *Missouri v. Holland*, 252 U.S. 416, 434 (1920); *Pennsylvania v. West Virginia*, 262 U.S. 553, 598-600 (1923); *Foster Fountain Co. v. Haydel*, 278 U.S. 1, 10 (1928); *Toomer v. Whitsell*, 334 U.S. 385, 402 (1948); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420-421 (1948); *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977); *Hughes v. Oklahoma, supra; South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 99-100 (1984).

Of special significance to the embargo-flow control issue here posed is this Court's opinion in *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949), which struck down on dormant Commerce Clause grounds a state's directive due to its effect on both intra and interstate commerce, and not a claim to ownership. In *H.P. Hood*, an out-of-state corporation that purchased New York raw milk at three licensed New York State located receiving depots before transporting the milk to Boston, Massachusetts for processing, was denied a fourth license because another facility would "deprive local markets of a supply needed during the short season".

Noting that the challenged order proposed to limit the local purchase of additional milk to withhold milk from export, this Court determined that protection of local economic interests through assuring a local supply of raw milk violated the dormant Commerce Clause:

> "[H]ere the challenge is only to a denial of facilities for interstate commerce upon the sole and specific grounds that it will subject others to competition and take supplies needed locally, an end, as we have shown, always held to be precluded by the Commerce Clause."

H.P. Hood, supra, 336 U.S. at 542.

The significance of *H.P. Hood* in applying the dormant Commerce Clause to intrastate preferences was clearly understood by Justice Black who, in his *H.P. Hood* dissent, characterized the question presented which had been answered in the negative by the majority of the Court as follows:

> "[W]hether the State can prefer the consumers of one community to consumers in another State as well as to consumers in other parts of its own territory."

H.P. Hood, supra, 336 U.S. at 575 (Black, J., dissenting Opinion).

Thus, this Court has already decided the converse of *Fort Gratiot*, holding that a state scheme granting local preferred rights of access to articles which may be shipped in commerce, but discriminates against others, both in-state and out-of-state, violates the dormant Commerce Clause.

Another opinion of this Court establishing invalidity of flow control is *Pike* itself, from which the *Pike* test is derived. In *Pike*, a state statute required that cantaloupes be packed in standard containers approved by a state official. Invoking his authority under the statute, the official issued an order prohibiting a grower from transporting his uncrated cantaloupes out-of-state for packing and processing. The grower challenged this order on Commerce Clause grounds.

The state contended that it imposed no burden upon interstate commerce because all that it regulated was the intrastate packing of goods. Interstate commerce, the state contended, began only when the articles were delivered to the interstate shipper. This Court rebuked this argument, noting that statutes expressly requiring that certain kinds of processing be done in the home state before shipment to a sister state had been "consistently invalidated by this Court under the Commerce Clause". *Pike, supra,* 397 U.S. 137, 142 (1970).

Having determined that the statute did affect commerce, the Court squarely addressed the dubious nature of flow control embargoes, stating:

> "[T]he Court has viewed with particular suspicion state statutes requiring business operation to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal."

Pike, supra, 397 U.S. at 145 (citations omitted). *See Hughes v. Oklahoma, supra* (invalidating on Commerce Clause grounds state restriction on export of minnows).

Fort Gratiot is but the latest in a series of cases dooming flow control. Although *Fort Gratiot* dealt with the importation of out-of-county generated solid wastes, its significance to resolution of the flow control issues raised herein cannot be understated. Not only did *Fort Gratiot* itself determine that solid waste is part of the national stream of commerce, but also it held that a state statute permitting exclusion of out-of-county generated wastes was unconstitutional because it discriminated against interstate commerce. Even though couched in terms of the boundaries of a locality within the state, the fact that the state statute enabled the locality to equally adversely impact upon out-of-county and out-of-state solid wastes was deemed to constitute facial discrimination against out-of-state wastes, by adversely affecting them in relation to in-county generated wastes. Indeed, *Fort Gratiot* referred to this conundrum as provisions which "unambiguously discriminate against interstate

commerce", in concluding that the virtually *per se* rule of invalidity adhered to the statute. *Fort Gratiot, supra,* 112 S.Ct. at 2027.

Thus, logic and the law suggest that any attempt by a state or locality to restrict the stream of commerce in solid wastes by limiting or extinguishing the power to export those wastes from the state, or any of its political subdivisions, ought meet with a similar declaration of unconstitutionality on Commerce Clause grounds.

IV. CONCLUSION

For the foregoing reasons, it is respectfully submitted that flow control necessarily violates the dormant Commerce Clause because it interferes with the circle of commerce, and contradicts this Court's precedent and national policy as enunciated both by Congress and the Executive Branch. Flow control is economic protectionism which interferes with the natural, national free market in solid wastes. Therefore, NSWMA respectfully prays that this Honorable Court, in addition to reversing and remanding the Supreme Court, Appellate Division, Second Department of the State of New York, and declaring the ordinance of the Town of Clarkstown unconstitutional, also consider the broader issues posed by the 29 states which already have authorized the imposition of flow control, so this court's opinion can elucidate now the circle of commerce of solid wastes as set forth herein, thereby precluding the cluttering of this Court's docket with multiple petitions and appeals arising from the imposition of flow control.

Respectfully submitted

Bruce J. Parker, Esquire
NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION
1730 Rhode Island Ave., N.W.
Suite 1000
Washington, D.C. 20036
(202) 659-4613

By: Bruce L. Thall, Esquire
ABRAMSON, FREEDMAN & THALL
2128 Locust Street
Philadelphia, PA 19103
(215) 545-2400
Counsel for Amicus Curiae

Supreme Court, U.S.
FILED
JUL 16 1993
OFFICE OF THE CLERK

No. 92-1402

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

C & A Carbone, Inc., Recycling Production of Rockland, Inc., C & C Realty, Inc. and Angelo Carbone,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

BRIEF OF *AMICI CURIAE* CHEMICAL MANUFACTURERS ASSOCIATION, AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION, AMERICAN FOREST & PAPER ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

THEODORE L. GARRETT*
ALLAN B. MOORE
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Counsel for *Amici Curiae*

*Counsel of Record

July 16, 1993

BEST AVAILABLE COPY

No. 92-1402

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

C & A Carbone, Inc., Recycling Production of Rockland, Inc., C & C Realty, Inc. and Angelo Carbone,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

MOTION OF CHEMICAL MANUFACTURERS ASSOCIATION, AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION, AMERICAN FOREST & PAPER ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to Rule 37.3 of this Court, and for the reasons set forth in the accompanying statement of their interests, the Chemical Manufacturers Association ("CMA"), American Automobile Manufacturers Association ("AAMA"), American Forest & Paper Association ("AFPA"), and National Association of Manufacturers ("NAM"), hereby respectfully move, with the written consent of all parties, for leave to file the accompanying joint brief as *amici curiae* in support of Petitioners. A copy of

the parties' written consent has been filed with the Clerk of the Court.

Respectfully submitted,

DAVID F. ZOLL
JACQUELINE A. SINCORE
CHEMICAL MANUFACTURERS ASSOCIATION
2501 M Street, N.W.
Washington, D.C. 20037
(202) 887-1190

THEODORE L. GARRETT*
ALLAN B. MOORE
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

PHILLIP D. BRADY
KATHY BAILEY
AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION
1620 Eye Street, N.W., #100
Washington, D.C. 20006
(202) 775-2746

*Counsel of Record

CINDY EVANS
AMERICAN FOREST & PAPER ASSOCIATION
1250 Connecticut Ave., N.W., #210
Washington, D.C. 20036
(202) 463-2582

JAN AMUNDSON
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., N.W., #1500-N
Washington, D.C. 20004-1703
(202) 637-3000

Counsel for *Amici Curiae*

July 16, 1993

QUESTION PRESENTED

Whether a town ordinance that prohibits, without a valid non-protectionist purpose, the importation of "unacceptable" waste and the exportation of "acceptable" waste constitutes an improper burden on interstate commerce in violation of the Commerce Clause of the United States Constitution.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. IF UPHELD, THE CLARKSTOWN ORDINANCE COULD HAVE HARMFUL, FAR-REACHING EFFECTS ON BOTH INTERSTATE COMMERCE AND THE ENVIRONMENT 4

II. SECTION 5 OF THE CLARKSTOWN ORDINANCE UNCONSTITUTIONALLY DISCRIMINATES AGAINST INTERSTATE COMMERCE BY FLATLY FORBIDDING THE IMPORTATION OF "UNACCEPTABLE" WASTE 6

III. SECTION 3 OF THE CLARKSTOWN ORDINANCE IMPOSES AN UNCONSTITUTIONAL BURDEN ON THE FREE FLOW OF INTERSTATE COMMERCE BY FLATLY FORBIDDING THE EXPORTATION OF "ACCEPTABLE" WASTE 9

A. The Ordinance's Restriction on Exportation Is No Less Insidious and Unconstitutional Than Its Restriction on Importation 10

TABLE OF CONTENTS—Continued

Page

B. The Town Has Not Met Its Burden of Demonstrating that the Ordinance Is Supported By a Valid Factor Unrelated to Economic Protectionism 12

C. Even If It Is Supported by Valid Local Interests, Section 3 Still Violates the Commerce Clause Because It Imposes an Excessive, Protectionist Burden Upon Interstate Commerce 14

IV. THIS COURT SHOULD EXPRESSLY REJECT THE REASONING OF LOWER COURTS THAT ARE SUPPORTIVE OF THE CLARKSTOWN ORDINANCE AND SIMILAR "FLOW CONTROL" LAWS 15

CONCLUSION 17

TABLE OF AUTHORITIES

CASES **Page**

Arkansas Electric Cooperative v. Arkansas Public Service Comm'n, 461 U.S. 375 (1983) 7

Baldwin v. GAF Seelig, Inc., 294 U.S. 511 (1935) 12

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992) . . . . . *passim*

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 8

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S. Ct. 2019 (1992) 6, 8, 9

Foster-Fountain Packing, Co. v. Haydel, 278 U.S. 1 (1928) 11

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949) 3, 11

Harvey & Harvey, Inc. v. Delaware Solid Waste Authority, 600 F. Supp. 1369 (D. Del. 1985) 16, 17

Hughes v. Oklahoma, 441 U.S. 322 (1979) . . . 5, 11, 15

Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985) 16, 17

TABLE OF AUTHORITIES — Continued

Page

In re Fiorillo Brothers, 577 A.2d 1316 (N.J. Super. Ct.), *review denied*, 585 A.2d 371 (N.J. 1990) 16

J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection, 857 F.2d 913 (3d Cir. 1988) 16

Johnson v. Haydel, 278 U.S. 16 (1928) 11

New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) 11

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) . . . . . *passim*

Procunier v. Navarette, 434 U.S. 555 (1978) 7

Silber v. United States, 370 U.S. 717 (1962) 7

South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) 11

Sporhase v. Nebraska, 458 U.S. 941 (1982) 11

Toomer v. Witsell, 334 U.S. 385 (1948) 11

United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) 7

Vance v. Terrazas, 444 U.S. 252 (1980) 7

Wyoming v. Oklahoma, 112 S. Ct. 789 (1992) 12

TABLE OF AUTHORITIES — Continued

MISCELLANEOUS **Page**

C. Baird Brown, "A Checklist for Legally Enforceable Obligations To Use Disposal Services," *printed in* ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulation, and Contracts and Financing* (1988) 15

Petition for Certiorari, *Carbone v. Clarkstown*, No. 92-1402 . . . . . *passim*

Supreme Court Rules 7

U.S. Const. art. I, § 8, cl. 3 3

U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action* (Sept. 1988) 15

No. 92-1402

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC. AND ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

BRIEF OF *AMICI CURIAE* CHEMICAL MANUFACTURERS ASSOCIATION, AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION, AMERICAN FOREST & PAPER ASSOCIATION, AND NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

The Chemical Manufacturers Association ("CMA") is a nonprofit trade association whose member companies account for more than ninety percent of the basic industrial chemicals produced in the United States. The American Automobile Manufacturers Association ("AAMA") represents the domestic automobile manufacturers. Its members, Chrysler

Corporation, Ford Motor Company, and General Motors Corporation, produce approximately eighty-one percent of all U.S.-built passenger cars and light trucks. The American Forest & Paper Association ("AFPA") is the national trade association of the forest, pulp, paper, paperboard, and wood products industry. Its member companies employ 1.4 million people, generate annual sales of $200 billion, and account for over seven percent of the nation's total manufacturing output. The National Association of Manufacturers of the United States of America ("NAM") is a voluntary business association of approximately 12,000 companies and subsidiaries, employing eighty-five percent of all manufacturing workers and producing over eighty percent of the nation's manufactured goods.

Together and individually, these four Associations represent member companies that operate chemical plants, automobile assembly plants, pulp and paper mills, and other manufacturing and production facilities in every state in the country. These facilities generate both hazardous and non-hazardous waste in the course of their operations. Many of the member companies also own or operate wastewater treatment facilities, private landfills, and other waste disposal operations to treat and dispose of the waste that they (and, in some circumstances, their customers) generate. In most cases, these are interstate operations, and the companies' waste disposal and treatment facilities — or others that they contract to use — are based in locations different from those in which the waste itself is generated.

The foregoing Associations therefore have a substantial interest in the "flow control" legislation at issue in this appeal. They file this joint brief as *amici curiae* in support of Petitioners, with the written consent of all parties.

SUMMARY OF ARGUMENT

Two sections of the Clarkstown ordinance are at issue in this appeal, and both are unconstitutional. Section 5 flatly prohibits the importation of "unacceptable" waste.[1] This provision directly discriminates against interstate commerce involving out-of-town waste. It therefore violates the Commerce Clause[2] under the express terms of this Court's prior decisions, including two decisions announced last Term.

Section 3 flatly prohibits the exportation of "acceptable" waste. This provision similarly burdens the free flow of interstate commerce. As an export restriction, it differs in kind from the import restriction imposed by Section 5 and the similar restrictions struck down by the Court last Term, but the anticompetitive and unconstitutional purpose and effect are the same. The only real difference is the locus of the burden. Indeed, the Town has neither demonstrated nor attempted to demonstrate a valid, non-protectionist purpose for the export prohibition embodied in Section 3, and the only legitimate purposes that one might generously infer either are affirmatively disserved by the provision or can be served more effectively by less burdensome alternatives. In any event, no asserted governmental purpose, whether legitimate or not, can justify a categorical prohibition on exportation with such a

---

[1] The ordinance defines "unacceptable waste" to include hazardous waste, pathological waste, and sludge. The ordinance defines "acceptable waste" to include "[a]ll residential, commercial and industrial solid waste as defined in New York State Law, and Regulations, including Construction and Demolition Debris" and excluding "Hazardous Waste, Pathological Waste [and] Sludge." See Town of Clarkstown, Local Law 9, § 1 (1990), *quoted in* Pet. Cert. at 48a-49a.

[2] The Commerce Clause provides that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. By "negative" implication, the several States do not have the power to regulate commerce and therefore may not interfere with the free flow of interstate trade through unduly restrictive or protectionist regulation. *See, e.g., H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 535 (1949).

purely isolationist and protectionist effect — an effect with harmful and far-reaching consequences for the nation's industry, economy, and environment.

To the extent that prior decisions by some lower courts reject this reasoning and can be read as supportive of the Clarkstown ordinance and similar "flow control" laws, those decisions are demonstrably unsound. This Court therefore should expressly reject the Commerce Clause jurisprudence espoused by such decisions.

ARGUMENT

I. IF UPHELD, THE CLARKSTOWN ORDINANCE COULD HAVE HARMFUL, FAR-REACHING EFFECTS ON BOTH INTERSTATE COMMERCE AND THE ENVIRONMENT.

Affirmance of the lower court's decision in this case would have two immediate effects with severely harmful long-term consequences. First, such a ruling would mean, by definition, that local jurisdictions may force consumers and businesses alike to patronize local disposal facilities at a monopoly price without any demonstration that those facilities are more efficient, more environmentally sound, or safer than available, non-local alternatives. Indeed, the record here reveals both (a) that the legislatively subsidized Town facility is substantially more expensive than the alternative offered by Petitioners ($81 per solid ton *versus* $70 per solid ton) and (b) that the Town has offered no proof or even a suggestion that its facility is a superior operation.

If ordinances like Clarkstown's are upheld, waste management could become the latest vehicle through which local jurisdictions address their revenue shortfalls. Precisely at a time when our society is becoming more concerned about the propriety of its disposal sites and methods, parochial financial

concerns would be elevated over environmental and safety concerns, and the already sizeable costs of waste disposal would increase — both in the near term and in the long term — with no cognizable offsetting benefit.

Second, upholding the Clarkstown ordinance would put communities and businesses that otherwise compete with the Clarkstown facility at a distinct disadvantage, which would likely result in a pattern of retaliatory (or, at least, like-minded) legislation.[3] This is one of the principal scourges that the Commerce Clause was intended to prevent. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979) (noting that the Framers of the Constitution were motivated, when drafting the Commerce Clause, by the conviction that "the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation").

The combined costs of the proliferation of such legislation to the nation's industry, economy, and environment would be enormous. In response to several recent trends — including the already spiraling expenses of waste disposal, increased environmental legislation at both the state and federal levels, and heightened public concern about the environment — thousands of industrial corporations, including many represented by the present *amici*, have invested millions of dollars and tremendous energy to develop more efficient, state-of-the-art disposal facilities and techniques. In many

---

[3] Certain communities and locations are simply ill-equipped to handle the disposal of wastes, and it is a geologic, geographic, economic, and legal reality that some of these communities and locations will never be able to develop the capacity to handle wastes. If upheld, the Clarkstown ordinance could lead to a nationwide trend that produces a perverse incentive for some of these communities to attempt to internalize their waste, as a means of generating revenue and competing with surrounding communities. Conversely, if similar flow control laws proliferate, some of these communities that properly should export their wastes may be unable to find suitable disposal sites.

cases, these efforts have resulted in the intracompany consolidation and centralization of once dispersed operations that now use less energy and less space than previous operations or that use sophisticated equipment not economically available in multiple locations. To require these businesses — which bring considerable expertise and resources to bear on waste-related issues and which greatly appreciate the environmental and legal ramifications of the subject — to dispose of all wastes in the jurisdictions where those wastes are generated would undermine these extremely positive developments and increase the costs of waste management and disposal throughout industry by an unfathomably large factor.

Inevitably, these new costs would have to be passed on to the society at large, in the form of higher prices, diminished investment capital, decreased salaries and employment opportunities, and an overall lowering of the nation's competitive standing in the global economy. State and local governments might temporarily ensure their own economic stability, but only at the expense of the economic stability of the interdependent nation as a whole.

II. SECTION 5 OF THE CLARKSTOWN ORDINANCE UNCONSTITUTIONALLY DISCRIMINATES AGAINST INTERSTATE COMMERCE BY FLATLY FORBIDDING THE IMPORTATION OF "UNACCEPTABLE" WASTE.

The enactment of protectionist legislation to govern the disposal and management of wastes is a growing and disturbing national trend. The Court addressed at least two products of this trend last Term, in complementary decisions that invalidated waste import restrictions. *See Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992). In the present

case, Petitioner focuses on a waste *export* restriction, but to properly understand the constitutional vice in that restriction, one must begin with the Court's reasoning and recent decisions involving waste import laws. In fact, the present case itself involves an import restriction — Section 5 of the Clarkstown ordinance — which is invalid under the express terms of the Court's recent rulings.[4]

Section 5 of the Clarkstown ordinance states in pertinent part:

> It shall be unlawful, within the Town, to dispose of or attempt to dispose of acceptable or unacceptable waste of any kind generated or collected outside

---

[4] Because Petitioners' business does not involve the importation of "unacceptable" waste for final disposal inside Clarkstown (*see* Pet. Cert. at 4.), the Petition for Certiorari focused on the export prohibition embodied in Section 3 and only cursorily addressed the import prohibition embodied in Section 5. Nonetheless, the Court may and should also address the constitutionality of Section 5. The Court has recognized its power to address substantially related questions in the past. *See* Sup. Ct. R. 14.1(a); *Procunier v. Navarette*, 434 U.S. 555, 560 n.6 (1978) ("our power to decide is not limited by the precise terms of the question presented"); *see also Vance v. Terrazas*, 444 U.S. 252, 259 n.5 (1980). It also has recognized the propriety of exercising that power in circumstances similar to those presented here. *See Arkansas Elec. Coop. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382-83 n.6 (1983) (relationship between two Commerce Clause challenges "close enough" for one not specifically raised in petition to be considered "subsidiary question fairly included therein").

Moreover, as the lower courts' opinions reveal, neither those courts nor Petitioners differentiated between the import restriction and the export restriction when addressing the constitutionality of the ordinance below. *See* Pet. Cert. at 29a (trial court); *see* Pet. Cert. at 11a-12a (appellate division). Accordingly, Respondent cannot claim to be prejudiced in having to address both arguments here. *See United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 371-72 n.4 (1967).

In any event, the Court's Rules provide that, "[a]t its option, . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." Sup. Ct. R. 24.1(a); *see Silber v. United States*, 370 U.S. 717 (1962).

> the territorial limits of the Town of Clarkstown, except for [1] acceptable waste disposed of at a Town operated facility . . . and [2] recyclables . . . brought to a recycling center established by special permit . . . .

Town of Clarkstown, Local Law 9, § 5(A) (1990), *quoted in* Pet. Cert. at 53a. On its face, this provision constitutes a blanket prohibition against the importation of "unacceptable" waste and a nearly blanket prohibition against the importation of other forms of waste. Under the express terms of this Court's recent decisions in *Fort Gratiot Landfill* and *Chemical Waste Management*, as well as its earlier decision in *City of Philadelphia* v. *New Jersey*, 437 U.S. 617 (1978), such a prohibition is clearly unconstitutional.

In the *Philadelphia* case, this Court recognized that "[a]ll objects of interstate trade merit Commerce Clause protection," including forms of waste, and it struck down a New Jersey law that burdened interstate commerce in waste. 437 U.S. at 622; *see also Fort Gratiot Landfill*, 112 S. Ct. at 2023 ("[s]olid waste, even if it has no value, is an article of commerce"). The law at issue was remarkably similar to Section 5(A) of the Clarkstown ordinance at issue here. It prohibited, with a few narrow exceptions, the importation of "'any solid or liquid waste which originated or was collected outside the territorial limits of the State.'" 437 U.S. at 618 (quoting New Jersey statute).

Both that law and Section 5(A) are also remarkably similar to the Michigan law that the Court invalidated last year in *Fort Gratiot Landfill*. That law forbade private landfill operators from accepting solid waste that is generated outside of the county in which their facilities are located. The New Jersey and Michigan laws could not withstand constitutional scrutiny for the same reason that Section 5(A) cannot withstand it here: on its face, the provision

discriminates against objects in interstate commerce that originate outside of the local jurisdiction.

In the present case, Clarkstown has not even suggested a valid basis for treating waste generated outside of its territorial limits any differently from waste generated within, and there is no evidence before the Court to suggest that there is any qualitative difference between foreign waste and local waste of the same kind sufficient to justify the distinction. *See Chemical Waste Management*, 112 S. Ct. at 2015 (invalidating hazardous waste disposal fee imposed only on hazardous waste generated out-of-state in part because "there is absolutely no evidence before this Court to suggest that waste generated outside [the local jurisdiction] is more dangerous than waste generated in [the local jurisdiction]"); *see also Fort Gratiot Landfill*, 112 S. Ct. at 2027.

The Court therefore should hold Section 5(A) unconstitutional, *a fortiori*, under the express terms of its prior decisions.

III. SECTION 3 OF THE CLARKSTOWN ORDINANCE IMPOSES AN UNCONSTITUTIONAL BURDEN ON THE FREE FLOW OF INTERSTATE COMMERCE BY FLATLY FORBIDDING THE EXPORTATION OF "ACCEPTABLE" WASTE.

Section 3 of the Clarkstown ordinance violates the Commerce Clause for reasons similar to those that apply to Section 5. Section 3 states in pertinent part:

> C. All acceptable waste generated within the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility . . . or to such other

disposal or recycling facilities operated by the Town of Clarkstown . . . .

D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than the facilities or sites set forth in Paragraph "C" above.

Town of Clarkstown, Local Law 9, § 3(C)-(D) (1990), *quoted in* Pet. Cert. at 52a.

A. The Ordinance's Restriction on Exportation Is No Less Insidious and Unconstitutional Than Its Restriction on Importation.

The court below concluded that the Clarkstown ordinance does not violate the Commerce Clause because it "applies evenhandedly to all solid waste processed within the Town, regardless of point of origin." Pet. Cert. at 11a. There are two flaws in this conclusion. First, the fact that the ordinance treats all waste that is *processed* within the Town evenhandedly is no answer to the fact that it discriminates in requiring such in-town processing in the first place. As demonstrated above, the import prohibition embodied in Section 5 plainly and facially discriminates against waste originating beyond the Town's limits. The export prohibition embodied in Section 3 similarly discriminates against waste that is headed for destinations out of town.

Second, the court's conclusion belies a fundamental misunderstanding of the nature and scope of the Commerce Clause's protections. In essence, the court's opinion appears to suggest that import restrictions and export restrictions do not stand on equal constitutional footing and that while the former may run afoul of the Constitution, the latter, in similar circumstances, may not.

This Court has never subscribed to such reasoning. Rather, the Court's decisions have recognized that a restriction on exports is no less of an imposition on interstate commerce than a restriction on imports.[5] A local law may violate the Commerce Clause not only by discriminating against classes or objects of trade *originating* in a foreign jurisdiction but also by discriminating against classes or objects of trade that are *destined* for a foreign jurisdiction. For example, in the leading case of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Court unanimously held that an Arizona law that restricted the export of cantaloupes violated the Commerce Clause.

The law at issue in *Pike* prohibited the shipment of Arizona-grown cantaloupes out of state in bulk containers and required that they "'be packed in regular compact arrangement in closed standard containers approved by the [state] supervisor.'" 397 U.S. at 138 (quoting Arizona statute). In an argument similar to Respondent's arguments here, the State of Arizona argued that its export restriction "imposes no burden on interstate commerce" because, "[i]f the Arizona Act is complied with, . . . all that will be regulated will be the intrastate packing of goods destined for interstate commerce." *Id.* at 140. In rejecting this contention, the Court noted that, "[i]f the [State's] theory were correct, then statutes expressly requiring that certain kinds of processing be done in the home State before shipment to a sister State would be immune from constitutional challenge[, and y]et such statutes have been consistently invalidated by this Court under the Commerce Clause." *Id.* at 141-42 (citing five prior

---

[5] *See, e.g., South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984); *Sporhase v. Nebraska*, 458 U.S. 941 (1982); *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982); *Hughes v. Oklahoma*, 441 U.S. 322 (1979); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949); *Toomer v. Witsell*, 334 U.S. 385 (1948); *Johnson v. Haydel*, 278 U.S. 16 (1928); *Foster-Fountain Packing, Co. v. Haydel*, 278 U.S. 1 (1928).

Supreme Court decisions). Writing for the Court, Justice Stewart explained:

> [T]he Court has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal.

Id. at 145 (citations omitted). Numerous decisions both before and since *Pike* have invalidated export restrictions on similar grounds. *See supra*, note 5.

In short, in this Court's Commerce Clause jurisprudence, "what is ultimate is the principle that one State in its dealings with another may not place itself in a position of economic isolation," and the Court has been no more hesitant (and, in fact, less hesitant) to strike down isolationist barriers when they come in the form of export restrictions than when they come in the form of import restrictions. *Baldwin v. GAF Seelig, Inc.*, 294 U.S. 511, 527 (1935).

B. The Town Has Not Met Its Burden of Demonstrating that the Ordinance Is Supported By a Valid Factor Unrelated to Economic Protectionism.

If a local law discriminates against items in interstate commerce, the local government that passed it bears the burden of proving that "the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 801 (1992). Clarkstown has not met this burden.

The Town purports to have a legitimate governmental purpose for enacting the ordinance, as the ordinance itself suggests. Section 2 of the ordinance states in part:

> The powers and duties enumerated in this law constitute proper town purposes intended to benefit the health, welfare and safety of Town residents. Additionally, it is hereby found that, in the exercise of control over the collection, transportation and disposal of solid waste, the Town is exercising essential and proper governmental functions.

Town of Clarkstown, Local Law 9, § 2(A)(II) (1990), *quoted in* Pet. Cert. at 53a. Both courts below found this legislative affirmation to be sufficient. As the Appellate Division noted:

> Local governments have long been authorized to enact laws relating to the "safety, health and well-being of persons or property" and it is well settled that the regulation of solid waste collection and disposal, a function traditionally entrusted to State and local governments, is fundamentally related to the public health and welfare.

Pet. Cert. at 9a (quoting New York Constitution) (citations omitted).

As this Court recently explained in *Chemical Waste Management*, however, empty rhetoric cannot carry the local jurisdiction's burden. *See* 112 S. Ct. at 2014 (finding that "only rhetoric, and not explanation, emerge[d]" in support of the discriminatory Alabama law at issue). Here, the Town has presented absolutely no evidence to prove or even to attempt to prove that the export restriction in question furthers "the health, welfare and safety of Town residents." Indeed, it is clear that the export restriction in Section 3 has even less legitimacy than the import restriction in Section 5 and the other import restrictions that this Court has repeatedly held

invalid. In the import restriction cases, the enacting jurisdictions are motivated by a desire to exclude allegedly inferior products from their markets or, in cases involving waste, by a desire to prevent trash generated by other jurisdictions from landing in their backyards. Arguably, such motivations are facially valid legislative purposes. *See Chemical Waste Management*, 112 S. Ct. at 2017-19 (Rehnquist, C.J., dissenting). Here, however, it is inconceivable that the ordinance furthers the asserted governmental interests. The export restriction at issue mandates the *retention of waste* within the local jurisdiction; waste retention cannot possibly promote the "health, welfare and safety of Town residents."

In short, it is apparent that the true legislative motivation underlying Section 3 is the purely protectionist desire to enhance Town revenues by monopolizing the business of solid waste management within the town limits in order to guarantee the viability of the Town-designated facility — at least (and only) to the extent that "acceptable," non-hazardous materials are involved. Indeed, thus far, the Town has not actually argued otherwise, and it certainly has not carried its burden of proving otherwise.

C. Even If It Is Supported by Valid Local Interests, Section 3 Still Violates the Commerce Clause Because It Imposes an Excessive, Protectionist Burden Upon Interstate Commerce.

This Court "has viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere. Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (citations omitted). The facts here indisputably suggest that Petitioners' interstate operation is more efficient than the Town's local operation,

and, as explained above, the counterproductive and anticompetitive effects of the prohibition are substantial.

Moreover, even if the Court were to find that the ordinance does advance legitimate local interests and that it is not illegal *per se*, the Court still should hold it unconstitutional. If a local law that promotes legitimate purposes substantially burdens interstate commerce, the question becomes whether those purposes "could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142; *see Hughes*, 441 U.S. at 336. The enacting jurisdiction then has the burden of demonstrating the ineffectiveness of less discriminatory and less burdensome alternatives. Here, the Town has not borne that burden.[6]

IV. THIS COURT SHOULD EXPRESSLY REJECT THE REASONING OF LOWER COURTS THAT ARE SUPPORTIVE OF THE CLARKSTOWN ORDINANCE AND SIMILAR "FLOW CONTROL" LAWS.

The decisions of the New York State courts in this case are not unique. Approximately one half of the nation's state legislatures have authorized their local communities to enact flow control legislation; a substantial number of local communities have done so;[7] and several federal and state

---

[6] For example, the Town has not demonstrated that charging competitive rates would fail to attract sufficient revenues to support the Town-designated facility. Nor has it demonstrated the ineffectiveness of supplementing any such revenue shortfalls through appropriate taxes or utility charges. (Of course, if these alternatives would be ineffective, the appropriate conclusion may be that the Town's facility is inefficient and should not continue to operate.)

[7] *See generally*, U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action* (Sept. 1988) (discussing the increasing popularity and restrictive effects of local flow control legislation); C. Baird Brown, "A Checklist for Legally Enforceable

courts have upheld the resulting legislation against constitutional challenges. *See, e.g., J. Filiberto Sanitation, Inc. v. New Jersey Dep't of Envtl. Protection*, 857 F.2d 913 (3d Cir. 1988); *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); *In re Fiorillo Bros.*, 577 A.2d 1316 (N.J. Super. Ct.), *review denied*, 585 A.2d 371 (N.J. 1990); *Harvey & Harvey, Inc. v. Delaware Solid Waste Auth.*, 600 F. Supp. 1369 (D. Del. 1985).

All of these decisions are strikingly and disturbingly similar in two respects. First, by misapprehending the enormous and increasing complexity of the business of waste management, they consistently understate the effects of flow control laws on interstate commerce, characterizing those effects as ephemeral or incidental. *See, e.g., J. Filiberto*, 857 F.2d at 922 (finding that solid waste hauler had "shown no cognizable burdens on interstate commerce from the Rule requiring processing of trash at [the county's] transfer station"); *Hybud Equip. Corp.*, 654 F.2d at 1194 (finding that "[t]he effect on commerce [of an ordinance requiring patronage of a local solid waste facility in order to guarantee the economic feasibility of that facility] is minimal"); *Fiorillo Bros.*, 577 A.2d at 1323 (finding that "[t]he regulatory schemes dealing with New Jersey's garbage crisis when viewed as a whole do not burden interstate commerce").

Second, these decisions uniformly demonstrate a failure to appreciate that export restrictions are no less discriminatory and burdensome than import restrictions. The courts in these cases repeatedly focus on the fact that flow control laws apply evenhandedly within in the *local* market — wholly ignoring the incontestable fact that they still substantially burden

---

Obligations To Use Disposal Services," *printed in* ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulation, and Contracts and Financing* (1988).

commerce by preventing interstate carriers and foreign waste management facilities from respectively transporting and receiving waste that otherwise would come to them. *See, e.g., J. Filiberto*, 857 F.2d at 921 (stating that "[t]o the extent that the transfer station garners for itself all of the county's trash for disposal at a landfill, an activity previously performed by haulers, the effect falls equally on in-state as well as out-of-state haulers *operating in Hunterdon County*") (emphasis added); *Hybud Equip. Corp.*, 654 F.2d at 1194 (stating that "Akron's legislation does not have the effect of taxing or preventing competition by non-residents" *within Akron*); *Harvey & Harvey*, 600 F. Supp. at 1379 (stating that the challenged act and regulations "do not discriminate between in-state and out-of-state disposal facilities" because they only govern the in-state facility).

In short, because the effects of flow control legislation on interstate commerce are enormous and because, as export restrictions, they are no less discriminatory and burdensome than import restrictions, this Court should expressly address and reject the Commerce Clause jurisprudence embraced by those courts that would appear to uphold the constitutionality of the ordinance at issue here.

As the jurisprudence of these courts proliferates, so do similar flow control laws and similarly subsidized waste disposal facilities. The result is a growing overcapacity of such facilities accompanied, ironically, by monopoly prices. And with increasing frequency, the interests represented by the present *amici* find themselves held captive to local, protectionist interests with literally no recourse.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Appellate Division of the New York Supreme

Court, Second Department, and hold the Clarkstown ordinance unconstitutional.

Respectfully submitted,

DAVID F. ZOLL
JACQUELINE A. SINCORE
CHEMICAL MANUFACTURERS ASSOCIATION
2501 M Street, N.W.
Washington, D.C. 20037
(202) 887-1190

PHILLIP D. BRADY
KATHY BAILEY
AMERICAN AUTOMOBILE MANUFACTURERS ASSOCIATION
1620 Eye Street, N.W., #100
Washington, D.C. 20006
(202) 775-2746

CINDY EVANS
AMERICAN FOREST & PAPER ASSOCIATION
1250 Connecticut Ave., N.W., #210
Washington, D.C. 20036
(202) 463-2582

JAN AMUNDSON
NATIONAL ASSOCIATION OF MANUFACTURERS
1331 Pennsylvania Ave., N.W., #1500-N
Washington, D.C. 20004-1703
(202) 637-3000

THEODORE L. GARRETT*
ALLAN B. MOORE
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

*Counsel of Record

Counsel for *Amici Curiae*

July 16, 1993

Supreme Court, U.S.
FILED
AUG 20 1993
OFFICE OF THE CLERK

No. 92-1402

In The

Supreme Court of the United States

October Term, 1993

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC., and ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ Of Certiorari To The Supreme Court, Appellate Division, Second Department Of The State Of New York

BRIEF OF THE STATE OF NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

ROBERT J. DEL TUFO
Attorney General of New Jersey
Attorney for Amicus Curiae,
State of New Jersey
Division of Law
124 Halsey Street – 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
Tel.: (201) 648-3124

MARY C. JACOBSON
Assistant Attorney General
Of Counsel

CARLA VIVIAN BELLO
Senior Deputy Attorney General
Counsel of Record and on the Brief

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 8

ARGUMENT 10

LOCAL WASTE FLOW DIRECTIVES SUCH AS THOSE OF CLARKSTOWN AND NEW JERSEY DO NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES

A. Local Waste Directives are not Acts of Economic Protectionism which are *per se* Invalid Under the Commerce Clause nor are They Attempts to Hoard Natural Resources..... 10

B. Under *Pike* Balancing, the Legitimate Governmental Interests Advanced by Local Waste Flow Directives Outweigh the Incidental Effect Upon Interstate Commerce..... 13

C. There are no Adequate Alternatives to Control of Local Waste Flow 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

I. CASES

A.A. Mastrangelo, Inc. v. Environmental Protec. Dep't., 90 N.J. 666, 449 A.2d 516 (1982).....3, 15

Borough of Glassboro v. Gloucester Board of Chosen Freeholders, 100 N.J. 134, 495 A.2d 49 (1985)..... 15

California Reduction Company v. Sanitary Reduction Works, 199 U.S. 306 (1905)..... 15

Central Iowa Refuse System, Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d. 419 (8th Cir. 1983) 15

Chemical Waste Management, Inc. v. Hunt, 112 S.Ct. 2009 (1992)..... 14

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 3, 11, 14

Elizabeth v. State Dept. of Envtl. Protect., 198 N.J. Super. 41, 486 A.2d 356 (1984) 16

Evergreen Waste Systems, Inc. v. Metropolitan Serv. Dist., 643 F.Supp. 127 (D.Or.1986), *aff'd* 820 F.2d 1482 (9th Cir. 1987)..... 17

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S.Ct. 2019 (1992) 9, 14

Foster Fountain Packing Co., Inc. v. Haydel, 278 U.S. 1 (1928)..... 12

Gardner v. Michigan, 199 U.S. 325 (1905).....8, 15

H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949)..... 12

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)..... 17

TABLE OF AUTHORITIES – Continued

Page

Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960)..... 8

J. Filiberto Sanitation v. Dept, of Envir. Prot., 857 F.2d 913 (3rd Cir. 1988).....5, 16

Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981)..... 8

Maine v. Taylor, 477 U.S. 131 (1986) 11, 13

Matter of Fiorillo Bros. of New Jersey, 242 N.J. Super. 667, 577 A.2d 1316, *certif. denied*, 122 N.J. 363, 585 A.2d 371 (1990) 6, 16

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 8, 9, 14, 15, 16

New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988)..... 11

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 9, 10, 11, 13, 17

Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978)..... 14

Reeves, Inc. v. Stake, 477 U.S. 429 (1980).....12, 13

Shanye Bros., Inc. v. District of Columbia, 592 F.Supp. 1128 (D.D.C. 1984)..... 17

So. Ocean Landfill v. Mayor & County of Tp. of Ocean, 64 N.J. 190, 314 A.2d 65 (1974) 3

South Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984)..... 12

Sporhase v. Nebraska, 458 U.S. 941 (1982)..... 13

State v. New Jersey Trade Waste Ass'n, 96 N.J. 8, 472 A.2d 1050 (1984).....7, 18

TABLE OF AUTHORITIES – Continued

Page

Stephen D. DeVito, Jr. Trucking v. Rhode Island Solid Waste Management Corp., 770 F.Supp. 775 (D.R.I. 1991), *aff'd* 947 F.2d 1004 (1st Cir. 1991)..... 17

Swin Resource Systems, Inc. v. Lycoming County, 883 F.2d 245 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990)..... 17

Toomer v. Witsell, 334 U.S. 385 (1948)..... 12

Trade Waste Management Association v. Hughey, 780 F.2d 221 (3rd Cir. 1985).....7, 18

Waste Recycling v. Southeast Alabama Solid Waste Disposal Authority, 814 F.Supp. 1566 (M.D. Ala. 1993)..... 17

Waste Systems Corp.v. County of Martin, 985 F.2d 1381 (8th Cir. 1993)..... 17

II. STATUTES

N.J.S.A. 13:1E-1 *et seq.* 4

N.J.S.A. 13:1E-19..... 5

N.J.S.A. 13:1E-21..... 5

N.J.S.A. 13:1E-99.32 *et seq.*..... 4

N.J.S.A. 48:2-23 4

N.J.S.A. 48:2-24 4

N.J.S.A. 48:13A-1 *et seq.*..... 4

N.J.S.A. 48:13A-5..... 6

No. 92-1402

In The

Supreme Court of the United States

October Term, 1993

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC., and ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ Of Certiorari To The Supreme Court, Appellate Division, Second Department Of The State Of New York

BRIEF OF THE STATE OF NEW JERSEY AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

INTEREST OF AMICUS CURIAE

This case involves a challenge to the constitutional validity of a local ordinance enacted by Respondent Town of Clarkstown, New York, which requires all waste generated in Clarkstown to be brought to the Town's designated waste disposal facility, where it is there prepared for shipment out-of-State. This "waste flow control" ordinance was enacted by Clarkstown in the face of the imminent State-ordered closing of a local sanitary landfill

which had previously served Clarkstown's solid waste needs and in anticipation of the implementation of a comprehensive County solid waste management plan. The designated solid waste facility is owned by Clarkstown and operated by a private contractor under agreement with the Town.

Petitioners are holders of a State permit for the operation of a "recycling center" in Clarkstown who have been found by the Court below to have violated Clarkstown's waste control ordinance by operating an unauthorized solid waste transfer station and diverting waste from the designated facility for shipment out-of-State. Petitioners have challenged Clarkstown's waste control ordinance as an act of "economic protectionism" which is *per se* invalid under the Commerce Clause.

The State of New Jersey is vitally interested in this matter because New Jersey's ability to address effectively the environmental and social evils that have long plagued local solid waste collection and disposal activities within its borders is directly dependent upon its ability to manage the flow of locally generated waste.[1] New Jersey's current Statewide solid waste management program is based upon a network of statutes and implementing administrative regulations which require that all locally generated solid waste be ultimately brought to designated local disposal or transfer facilities, all of which are

[1] New Jersey agrees with the arguments made by the State of Ohio and the other states in the *Amicus* brief filed in support of Clarkstown. As one of the states with the most experience in flow control and the most extensive and advanced system of waste regulation, New Jersey is writing separately to put that experience and system before the Court.

franchised public utilities or are owned by government entities. Local waste flow directives have enabled solid waste management in New Jersey to evolve from a predominantly unregulated, private function to a highly sophisticated and interactive program of State and County planning activities, enforcement responsibilities, and expert technical review within a framework of governmental ownership and traditional public utility regulation.

Prior to 1970, most solid waste in New Jersey was collected by private haulers and disposed of at privately owned landfills. Environmental problems mounted and anticompetitive activities dominated what should have been a freely operating competitive market. In addition, New Jersey's growing dependency on rapidly dwindling landfills was threatening to create havoc in the disposal of solid waste. *A.A. Mastrangelo, Inc. v. Environmental Protec. Dep't.*, 90 *N.J.* 666, 449 *A.*2d 516 (1982); *So. Ocean Landfill v. Mayor & County of Tp. of Ocean*, 64 *N.J.* 190, 193, 314 *A.*2d 65, 66 (1974).

In 1978, a New Jersey statute which attempted to extend the lifespans of existing landfills in the State by banning the importation of out-of-State waste was declared unconstitutional by this Court. *City of Philadelphia v. New Jersey*, 437 *U.S.* 617 (1978). In the wake of that decision, New Jersey was faced with what was, in the words of the *City of Philadelphia* dissenters, an "unsolvable dilemma." *Id.* at 631. The State was running out of landfill space faster than other more environmentally sound, long-term, methods of solid waste disposal could be identified, developed, financed and put into operation.

Stripped of its ability to stem the tide of millions of tons of out-of-State waste coming into the State, New Jersey embarked on a massive planning effort to take control of locally generated waste and thus reduce its own demands on its dwindling landfills. Far from attempting to isolate itself from a national problem, New Jersey decided to become part of the solution. New Jersey's efforts in this regard are grounded in the State's Solid Waste Management Act, *N.J.S.A.* 13:1E-1 *et seq.* (the "Solid Waste Management Act"), which addresses the environmental and planning aspects of proper solid waste collection and disposal, and in New Jersey's Solid Waste Utility Control Act, *N.J.S.A.* 48:13A-1 *et seq.* (the "Utility Control Act"), which removes solid waste collection and disposal from the purely private sector and subjects all such activities to public utility regulation. In addition, under the Statewide Mandatory Source Separation and Recycling Act, (the "Recycling Act"), *N.J.S.A.* 13:1E-99.32 *et seq.*, New Jersey has intensified its recycling efforts so as to reduce the amount of waste generated in the State.

These enactments enable New Jersey to address both the environmental and economic aspects of local solid waste collection and disposal. New Jersey's citizens are assured solid waste services rendered by public utilities which are statutorily obligated to provide "safe, adequate and proper service." *N.J.S.A.* 48:2-23. These services may not be discontinued without specific State authorization. *N.J.S.A.* 48:2-24. The Solid Waste Management Act, the Utility Control Act and the Recycling Act are administered by the New Jersey Department of Environmental Protection and Energy (the "NJDEPE").

Pursuant to regulations issued by the NJDEPE, all waste generated in New Jersey is ultimately directed to designated intermediate or final disposal facilities. These waste flow directives reflect the State reviewed and approved solid waste planning determinations of each County in New Jersey, as well as those of a statutory environmental zone known as the Hackensack Meadowlands, all of which are designated solid waste planning "districts" under the Solid Waste Management Act. *N.J.S.A.* 13:1E-19, *N.J.S.A.* 13:1E-21. Only waste generated in New Jersey is subject to direction and no attempt is made by New Jersey to direct waste merely being processed in, or being transported through, New Jersey. Consequently, if mixed waste is brought into New Jersey from out-of-State for the removal of recyclables, the solid waste residue from that process is not subject to New Jersey's waste flow laws. Similarly, New Jersey's locally generated waste may be taken out-of-State for sorting of recyclables as long as the residual solid waste is returned to New Jersey.

Currently, a small percentage (18%) of New Jersey's locally generated waste is directed to intermediate transfer facilities where it is prepared for shipment by such facilities to out-of-State disposal sites. These technologically advanced transfer facilities or "stations," as they are commonly known, have served as a critical bridge between the State's previous dependency on landfilling and the implementation of resource recovery and recycling programs. New Jersey's direction of locally generated waste in this manner has been judicially upheld against Commerce Clause challenges in *J. Filiberto Sanitation v. Dept. of Envir. Prot.*, 857 F.2d 913 (3rd Cir. 1988),

and in *Matter of Fiorillo Bros. of New Jersey*, 242 *N.J. Super.* 667, 577 *A.*2d 1316, *certif. denied*, 122 *N.J.* 363, 585 *A.*2d 371 (1990).

In addition to the planning authority vested in the NJDEPE under the Solid Waste Management Act, the Utility Control Act authorizes the NJDEPE to award solid waste disposal franchises and to require that all solid waste generated within a franchise area be disposed of at the designated franchised solid waste facility. *N.J.S.A.* 48:13A-5.[2]

For many years now, the direction of locally generated solid waste through the planning procedures of New Jersey's Solid Waste Management Act and Utility Control Act has served as the cornerstone of solid waste management activities in the State. By means of local waste flow direction, New Jersey has been able to plan for and ensure the proper disposal of locally generated solid waste. Far from operating so as to benefit local private industry, New Jersey's waste flow directives exist to further a statutorily created solid waste management program which has merged governmental entities and regulated public utilities in an intricate combined effort to render an essential governmental service.[3]

---

[2] This franchising authority was initially vested in the former New Jersey Board of Public Utilities. However, by gubernatorial executive order this authority was transferred to the NJDEPE.

[3] In order to construct the solid waste disposal facilities necessary to handle locally generated waste, governmental entities in New Jersey have issued an aggregate of 1.6 billion dollars in revenue bonds. The capital intensive nature of solid waste

In addition to enabling the State to plan for and provide facilities necessary for the long-term disposition of locally generated waste, the ability to direct local waste flow has served New Jersey well in addressing another of the State's historical problems in this area, *i.e.*, illegal dumping. Since solid waste collection rates are set by the State and reflect service costs, comparison of the tonnage records of a designated disposal facility with the customer billings submitted in support of a collector's rate filings facilitates the detection and deterrence of illegal dumping activities.

The ability to direct the flow of locally generated waste has enabled New Jersey, through its political subdivisions and its regulated public utilities, to provide coordinated, environmentally advanced, Statewide solid waste services. Because of this coordinated program, New Jersey has also been able to remedy social evils associated with an industry long dominated by organized criminal influences. See *Trade Waste Management Association v. Hughey*, 780 *F.*2d 221, 223 (3rd Cir. 1985). *State v. New Jersey Trade Waste Assn.*, 96 *N.J.* 8, 472 *A.*2d 1050 (1984). A coordinated State supervised solid waste program has also served to eliminate opportunities for "cream-skimming," a practice by which private industry would choose to serve only the more profitable customers.

---

services requires the establishment of waste flow franchises. Such franchises are, therefore, no different than those established with respect to other more traditional public utility services.

It is of great concern to New Jersey, therefore, that the ability of local government to direct the flow of locally generated waste within its borders be upheld by this Court. A ruling striking down Clarkstown's local waste flow ordinance would cast serious doubt upon the validity of New Jersey's current waste flow program and would seriously impede New Jersey's ability to take control of and remedy solid waste problems of the most significant local concern.

SUMMARY OF THE ARGUMENT

The collection and disposal of local waste is one of the most basic and essential functions of local government. It has been described as one of local government's "controlling" obligations, involving as it does the protection of the public health and welfare. *Gardner v. Michigan*, 199 *U.S.* 325, 332 (1905). Indeed, the management of local solid waste collection and disposal has been recognized by this Court as being encompassed within the inherent police powers reserved to state and local governing bodies. *Minnesota v. Clover Leaf Creamery Co.*, 449 *U.S.* 456 (1981). States have traditionally been accorded broad latitude in the exercise of their police powers. *Huron Portland Cement Co. v. City of Detroit*, 362 *U.S.* 440, 448 (1960). A state's authority to regulate commerce "is never greater than in matters traditionally of local concern." *Kassel v. Consolidated Freightways Corp.*, 450 *U.S.* 662, 670 (1981).

The primary purpose of local waste flow control laws, such as those in place in Clarkstown and in New

Jersey, is to direct the flow of locally generated waste from point of generation to point of final disposition in an orderly and environmentally sound manner, and to allocate this flow in such a way as to ensure the long-term availability and optimum operation of essential collection and disposal services. The direction of locally generated waste in this manner and for these significant governmental purposes is not an act of economic protectionism and, consequently, should be upheld under the Commerce Clause. Surely, local laws which are in furtherance of basic governmental responsibilities are not the type of local acts which have been held to be *per se* invalid under Commerce Clause analysis. See *Minnesota v. Clover Leaf Creamery Co.*, 449 *U.S.* at 472.

The more appropriate standard by which to evaluate the validity of local waste flow laws is that set forth in *Pike v. Bruce Church, Inc.*, 397 *U.S.* 137 (1970). Under this standard, where a local enactment operates evenhandedly to effectuate a valid local public interest and its effects upon interstate commerce are merely incidental, the local enactment will be upheld unless the burden imposed upon interstate commerce is found clearly excessive in relation to the local interest advanced. *Id.* at 142.

Local waste flow laws impose no burden upon interstate commerce. They direct only locally generated waste. In addition, they apply evenhandedly to in-state and out-of-state solid waste haulers who are equally prohibited from diverting locally generated waste from designated in-state facilities. These limited export bans are, therefore, significantly different from the import bans struck down in *City of Philadelphia* and *Fort Gratiot Sanitary Landfill,*

Inc. v. Michigan Department of Natural Resources, 112 *S.Ct.* 2019 (1992).

With respect to the local benefits furthered by such local waste flow laws, those go far beyond the fact that they ensure the economic viability of such facilities. Other significant local objectives furthered by local waste flow laws encompass rational long-range planning efforts, traffic reduction, the detection of illegal dumping activities, the ability to adjust waste flows quickly in the face of a temporary or permanent closing of a local facility, and maintenance of optimum operating levels at designated facilities. In view of the numerous legitimate governmental functions facilitated by local waste flow laws, *Pike* balancing supports the validity of these directives.

ARGUMENT

LOCAL WASTE FLOW DIRECTIVES SUCH AS THOSE OF CLARKSTOWN AND NEW JERSEY DO NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES

A. Local Waste Directives are not Acts of Economic Protectionism which are *per se* Invalid Under the Commerce Clause nor are They Attempts to Hoard Natural Resources.

This Court has consistently held that the level of scrutiny that a court must give to a local regulation challenged under the Commerce Clause of the United States Constitution depends upon whether it patently discriminates against interstate commerce or is merely

burdensome. See *New Energy Co. of Indiana v. Limbach*, 486 *U.S.* 269, 273-274 (1988); *City of Philadelphia v. New Jersey*, 437 *U.S.* at 624. When patent discrimination is involved, the regulation will be subjected to heightened scrutiny and a "virtually *per se* rule of invalidity" will be applied. *Id.* However, when a regulation serves a legitimate local governmental interest it will be invalidated only if its incidental burden upon interstate commerce is clearly excessive when weighed against the benefits it confers upon the state promulgating it. *Pike v. Bruce Church, Inc.*, 397 *U.S.* at 142.

To be judged *per se* invalid, therefore, a local waste flow directive would have to be found to have been "motivated solely by a desire to protect local industries from out-of-state competition" or, regardless of intent, to discriminate arbitrarily against interstate trade in its effect. *Maine v. Taylor*, 477 *U.S.* 131, 148, n.19 (1986). There is no such motivation underlying local waste flow laws nor any such effect. What is being protected by such laws is not local private industry, but rather the ability of local government to provide for the orderly and environmentally safe disposition of locally generated solid waste. This is strikingly evident in New Jersey where there exists no purely private solid waste industry that stands to benefit from a directed flow of locally generated waste.

This difference distinguishes waste flow laws from the local enactments found offensive in the "processing" cases cited by Petitioners. In all those cases the intent of the local requirements in question was not the provision of an essential governmental service, but rather the protection of either a local private industry or local employment in that industry. Thus, in *Pike v. Bruce Church, Inc.*,

the offensive law was aimed at promoting the reputation of local growers. 397 *U.S.* at 143. In *H.P. Hood & Sons, Inc. v. DuMond*, 336 *U.S.* 525 (1949), local action designed to protect the local milk industry was at issue. In *Foster Fountain Packing Co., Inc. v. Haydel*, 278 *U.S.* 1 (1928), and *Toomer v. Witsell*, 334 *U.S.* 385 (1948), local laws requiring the packing of shrimp or fish by local private industry were found constitutionally infirm. Similarly, in *South Central Timber Development, Inc. v. Wunnicke*, 467 *U.S.* 82 (1984), the local processing of timber purchased from the State was impermissibly required by the State as a condition of sale. In contrast to these situations, local waste flow laws promote only a legitimate local governmental necessity, not a private in-state economic interest.

Nor are there any similarities between this matter and those cases cited by Petitioners involving the "hoarding" of local natural resources. Garbage shares none of the characteristics commonly attributed to a natural resource. It is not found in nature and it does not serve any of man's most basic human needs. It is not water, land, game, fish, oil, coal, natural gas or timber which local governments possess in greater or lesser abundance as determined by fate. There is also a distinction to be drawn between goods produced naturally and those produced by the exertion of considerable human effort. See *Reeves, Inc. v. Stake*, 477 *U.S.* 429 (1980), holding that cement was not a natural resource but rather the product of human labor. Ironically, if garbage must be classified, it more readily falls within the latter category since man has gone to considerable lengths to find more and more ways of producing garbage with little, if any, thought given until recently to how to dispose of it properly.

It should be obvious, therefore, that garbage is no more a natural resource being hoarded by local government by means of waste flow laws than was the cement produced at the South Dakota cement factory and sold exclusively to local residents in *Reeves, Inc. v. Stake*. Even were garbage to be accorded the lofty status of a natural resource, however, this Court has recognized a State's right, in certain circumstances, to reserve a resource for the benefit of its citizens. See *Sporhase v. Nebraska*, 458 *U.S.* 941, 956 (1982).

B. Under *Pike* Balancing, the Legitimate Governmental Interests Advanced by Local Waste Flow Directives Outweigh the Incidental Effect Upon Interstate Commerce.

Given the absence of any attempt at economic protectionism or at the hoarding of a natural resource, this Court should apply the balancing test set forth in *Pike v. Bruce Church, Inc.* in evaluating the constitutional status of local waste flow laws. This Court has stated that "as long as a state does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation' . . . it retains broad authority under the Commerce Clause to protect the health and safety of its citizens, and the integrity of its natural resources." *Maine v. Taylor*, 477 *U.S.* at 151. Even where a state statute clearly burdens interstate commerce, it will not be struck down under the Commerce Clause if the burden is demonstrably justified by a legitimate factor unrelated to economic protectionism. *Pike v. Bruce Church, Inc.*, 397 *U.S.* at 142.

In the case of local waste flow laws, there exists no discrimination against interstate commerce. New Jersey's waste flow laws direct only locally generated waste to local facilities where such waste is prepared for transport to final disposal sites. Moreover, the requirement that locally generated waste be brought to designated franchised facilities applies evenhandedly to in-State haulers and out-of-State haulers alike. In addition, both in-State and out-of-State facilities may handle New Jersey waste for processing purposes (*e.g.*, sorting of recyclables), so long as residual waste is returned for disposal pursuant to local waste flow directives. The discrimination against interstate commerce which troubled this Court in *City of Philadelphia, Fort Gratiot* and *Chemical Waste Management, Inc. v. Hunt*, 112 *S.Ct.* 2009 (1992) does not exist here.

Even were this Court to find that interstate commerce is impacted by the operation of local waste flow laws, it should nevertheless conclude that the essential governmental functions served by these laws outweigh the merely incidental effects upon interstate commerce. A critical determination in a Commerce Clause balancing analysis is "the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce." *Raymond Motor Transportation, Inc. v. Rice*, 434 *U.S.* 429, 441 (1978). In *Minnesota v. Clover Leaf Creamery Co.*, 449 *U.S.* at 473, a state's interest in environmental protection, resource recovery and solid waste management was found sufficient justification for its prohibition against the sale of milk in plastic containers. This Court, examining the significant governmental concerns underlying such prohibition, held

that the burden placed upon interstate commerce was not excessive in relation to the substantial local interest benefited. *Id.*

That the collection and disposal of local solid waste involves substantial governmental interests of historic local concern should be beyond dispute. See *Gardner v. Michigan*, 199 *U.S.* at 332; *Minnesota v. Clover Leaf Creamery Co.*, 499 *U.S.* at 473; *California Reduction Company v. Sanitary Reduction Works*, 199 *U.S.* 306 (1905). This Court has stated that states have a "substantial state interest in . . . easing solid waste disposal problems." *Minnesota v. Clover Leaf Creamery Co.*, 449 *U.S.* at 473. The provision of adequate solid waste disposal facilities has been described as "an essential governmental activity." *Central Iowa Refuse System, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 *F.*2d. 419, 428 (8th Cir. 1983). Similarly, New Jersey's highest Court on many occasions has commented upon the magnitude of New Jersey's solid waste dilemma, describing the "rapid disappearance of available solid waste disposal facilities," as one of New Jersey's "most severe problems." *A.A. Mastrangelo, Inc. v. Environmental Protec. Dep't.*, 90 *N.J.* at 671, 449 *A.*2d at 519. See also *Borough of Glassboro v. Gloucester Board of Chosen Freeholders*, 100 *N.J.* 134, 141, 495 *A.*2d 49, 53 (1985). Any impact upon interstate commerce resulting from New Jersey's or Clarkstown's local waste flow laws pales in comparison to the vital governmental functions being served and, at most, is merely incidental to the performance of those functions.

Not only is any impact upon interstate commerce incidental, but it is so minimal as to be virtually non-

existent. In *J. Filiberto Sanitation v. New Jersey Dept. of Envir. Prot.*, 857 *F.*2d at 922, the constitutionality of New Jersey's waste flow laws was upheld against a Commerce Clause challenge by a local solid waste hauler. The Third Circuit Court stated that New Jersey's waste flow laws "place the burden of alleviating the trash problem upon New Jersey's residents" and do not burden interstate commerce. *Id.* at 921. Moreover, the Court of Appeals, quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 *U.S.* at 473 n.17, concluded that "the existence of substantial in-state interests harmed by a regulation is 'a powerful safeguard' against legislative discrimination." *Id.* Similarly, in *Matter of Fiorillo Bros. of New Jersey*, 242 *N.J. Super.* at 680, 577 *A.*2d at 1323, the Appellate Division of the Superior Court of New Jersey held that New Jersey's waste flow directives do not violate the Commerce Clause in that they impose no burden on interstate commerce and are intended to further a basic governmental function by "efficiently removing garbage from New Jersey streets." *Id.* Such factors as rational local planning activities, reduction of truck traffic, the compilation of the waste data necessary for negotiation of long and short-term disposal contracts, and the avoidance of excessive concentrations of solid waste in areas with inadequate disposal capacities, have also been judicially noted as valid governmental objectives served by local waste control laws. *J. Filiberto Inc. v. Dept. of Envir. Prot.*, 857 *F.*2d at 922; *Matter of Fiorillo Bros. of New Jersey*, 242 *N.J. Super.* at 679-80, 577 *A.*2d at 1323; *Elizabeth v. State Dept. of Env.*

Protect., 198 *N.J. Super.* 41, 486 *A.*2d 356 (1984).[4] All of these legitimate governmental objectives warrant the fullest exercise of local police powers.[5]

---

[4] Although some courts have remained unpersuaded with respect to the various non-economic benefits achieved by local waste flow control laws, see *e.g.*, *Stephen D. DeVito, Jr. Trucking v. Rhode Island Solid Waste Management Corp.*, 770 *F.Supp.* 775 (*D.R.I.* 1991), *aff'd* 947 *F.*2d 1004 (1st Cir. 1991); *Waste Systems Corp. v. County of Martin*, 985 *F.2d* 1381 (8th Cir. 1993); *Waste Recycling v. Southeast Alabama Solid Waste Disposal Authority*, 814 *F.Supp.* 1566 (M.D. Ala. 1993), it is respectfully submitted that the correct analysis is that set forth by the Third Circuit and by New Jersey State Courts in the cases cited herein.

[5] *Pike* balancing clearly demonstrates the validity of local waste flow laws. Some courts, however, have also looked to the market participant exception to Commerce Clause scrutiny, first articulated by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 *U.S.* 794 (1976), to uphold local waste management policies. In *Swin Resource Systems, Inc. v. Lycoming* County, 883 *F.*2d 245 (3rd Cir. 1989), *cert. denied*, 493 *U.S.* 1077 (1990), the Third Circuit used a market participant analysis to uphold a preference for local residents at a County-operated landfill. In *Evergreen Waste Systems, Inc. v. Metropolitan Serv. Dist.*, 643 *F.Supp.* 127 (D.Or.1986), *aff'd* 820 *F.*2d 1482 (9th Cir. 1987), the market participant doctrine was the basis for upholding a local ordinance restricting access to a district landfill to those within the district. In *Shanye Bros., Inc. v. District of Columbia*, 592 *F.Supp.* 1128 (D.D.C. 1984), a local restriction with respect to the deposit of only locally collected waste at a city operated disposal facility was upheld under a market participant analysis. The market participant exception was rejected, however, in *Waste Recycling v. Southeast Alabama Solid Waste Disposal Authority*, 814 *F.Supp.* at 1581, the Court there finding that local restrictions upon private haulers served solely the economic interests of the Southeast Alabama Solid Waste Authority.

C. There are no Adequate Alternatives to Control of Local Waste Flow.

As for Petitioners' contention that alternatives to local waste control exist which will accomplish similar objectives but in a "non-discriminatory" fashion, such contention has no merit nor a factual record to support it. First, as discussed above, local waste flow laws are non-discriminatory in their operation. Secondly, the so-called "adequate" alternatives proffered by Petitioners have all been explored by local government and found wanting. New Jersey certainly needs no further experience with the "competitive" solid waste market of which Petitioners speak, to know that such market is too highly susceptible to anticompetitive behavior of the worst kind to be relied upon as the provider of such essential governmental services as solid waste collection and disposal. New Jersey has learned from its history and does not intend to repeat it. See *Trade Waste Management Association v. Hughey*, 780 *F.*2d at 223; *State v. New Jersey Trade Waste Ass'n*, 96 *N.J.* at 25, 472 *A.*2d at 1059.

As for Petitioners' suggestion that local taxes can be used to subsidize rates at more expensive high-tech local facilities and thus make voluntary use of these facilities more attractive, such suggestion begs the issue. Local governments do not need to learn how to compete with private industry. Local governments are not in solid waste management to lure customers from private enterprise. Local government is in solid waste management because it has to be, and because it has to change the "throw away" mentality which created the solid waste crisis in the first place. Concealing the true costs associated with proper solid waste disposal would do little to

encourage recycling and resource recovery efforts. To merely coax customers into new high-tech, environmentally sound facilities by use of "bargain" rates will only perpetuate the very habits local government is trying to change. Indeed, local government will have served its citizens poorly if all it can accomplish by its efforts in local solid waste management is to teach its citizens to pick the cheapest, most competitive, short-term solid waste disposal option available. However, local government will have served its citizens well if it can compel even the least civic minded of them to support the most responsible and environmentally sound solid waste management and recycling program, the one which will provide for society's solid waste needs today and in the future. Petitioners' insistence on the existence of adequate alternatives to waste flow laws demonstrates a lack of understanding with respect to the difference between mere business objectives and governmental responsibilities.

Finally, this Court in *Fort Gratiot* carefully limited the scope of its ruling striking down a local waste import ban to circumstances not involving the public management of governmentally owned solid waste disposal facilities. In *Fort Gratiot*, this Court noted that no question "concerning policies that municipalities or other governmental agencies may pursue in the management of publicly owned facilities" was at issue, only "the validity of the Waste Import Restrictions as they apply to privately owned and operated landfills." 112 *S.Ct.* at 2023. New Jersey's practical experience in solid waste collection and disposal illustrates that direction of local waste flow is essential to the effectiveness of governmental efforts to provide efficient and environmentally sound solid waste

services. New Jersey urges this Court, therefore, to affirm the authority of local government to direct the flow of locally generated waste.

CONCLUSION

New Jersey urges this Court to uphold as constitutional the Respondent Clarkstown's local waste flow enactment as a legitimate exercise of governmental police powers, evenhanded in its application, untainted by motives of economic protectionism, and entitled to judicial deference.

Dated this 20 day of August, 1993

Respectfully submitted,

ROBERT J. DEL TUFO
Attorney General of the State
of New Jersey
Attorney for Amicus Curiae,
State of New Jersey
Division of Law
124 Halsey Street – 5th Floor
P.O. Box 45029
Newark, New Jersey 07101
Tel.: (201) 648-3124

By: Carla Vivian Bello
Senior Deputy Attorney General

MARY C. JACOBSON
Assistant Attorney General
Of Counsel

CARLA VIVIAN BELLO
Senior Deputy Attorney General
Counsel of Record and on the Brief

No. 92-1402

AUG 20 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC. AND ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ Of Certiorari To The Supreme Court, Appellate Division Second Department Of The State Of New York

BRIEF OF AMICUS CURIAE COUNTY OF SAN DIEGO, CALIFORNIA IN SUPPORT OF RESPONDENT

LLOYD M. HARMON, JR.
County Counsel
Counsel of Record
County of San Diego
DIANE BARDSLEY
Chief Deputy County Counsel
SCOTT H. PETERS
Deputy County Counsel
355 County Administration Center
1600 Pacific Highway
San Diego, CA 92101-2469
(619) 531-4860

Of Counsel,

W. CULLEN MACDONALD
ERIC S. PETERSEN
JEANNE M. SINCLAIR
HAWKINS, DELAFIELD & WOOD
67 Wall Street
New York, NY 10005
(212) 820-9333

JEROME A. BARRON
George Washington University
National Law Center
720 - 20th Street, N.W.
Washington, D.C. 20006
(202) 994-6954

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

Interest of the *Amicus Curiae* 1

I. In San Diego County, solid waste collection and disposal is a public health and safety concern as basic as police, fire, sewage disposal and water supply 2

II. In San Diego County, fundamental public interests are at stake in solid waste disposal decision making 3

III. San Diego County has made a huge public investment in waste disposal assets in reliance on long settled law giving it the right and responsibility to provide for public sanitation 7

IV. A decision invalidating Clarkstown's flow control law would threaten the viability of local governments' sanitation systems and deprive them of any realistic means of managing their waste 8

Summary of Argument 10

Argument 14

I. Local governmental monopolies have long served the ends of public health and safety by removing and disposing of immediately dangerous waste within their borders. Long settled constitutional principles sustain such public health and safety monopolies despite their anti-competitive effects 14

TABLE OF CONTENTS – Continued

Page

A. Governmental public health monopolization of the disposal of solid waste was long ago constitutionally validated by this Court. The disease avoidance reason remains wholly unchanged and current... 16

B. The receipt of financial benefits by actively participating local governmental public health monopolies does not render them subject to Commerce Clause review..... 19

II. Nothing in the Court's recent private landfill decisions suggests any alteration of the constitutional principles previously validating governmental waste monopolies 22

A. The market participant doctrine independently supports the propriety of reaffirming *California Reduction* and *Gardner* and their *per se* validation of municipal waste monopolies 24

B. This Court's prior *per se* immunization of municipal sewer monopolies under the Sherman Act is consistent with a declination to now require balancing inquiries under the Commerce Clause..... 26

III. Local government waste monopolies are valid when balanced under the *Pike v. Bruce Church* test..... 27

Conclusion 29

TABLE OF AUTHORITIES

Page

TABLE OF CASES

B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992)..... 6

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905)..... 11, 12, 16, 17, 19, 24

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992)..... 12, 22, 23

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)..... 12, 22, 23, 24, 27

Community Communications Co. v. Boulder, 455 U.S. 40 (1982)..... 26

District of Columbia v. Brooke, 214 U.S. 138 (1909).... 19

Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707 (1972)..... 21

Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992)..... 12, 22, 23, 24

Gardner v. Michigan, 199 U.S. 325 (1905)..11, 16, 17, 19, 24

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)..... 24

Hutcheson v. City of Valdosta, 227 U.S. 303 (1913).... 19

Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985) 12, 17

Hybud Equipment Corp. v. City of Akron, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985)..... 27

TABLE OF AUTHORITIES – Continued

Page

J. Filiberto Sanitation v. Department of Environmental Protection, 857 F.2d 913 (3d Cir. 1988) 26

Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346 (1939) 28

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 28

Morgan's Steamship Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886) 19

Olsen v. Smith, 195 U.S. 332 (1904) 27

Ouachita Packet Co. v. Aiken, 121 U.S. 444 (1887) ..19, 21

Packet Co. v. Catlettsburg, 105 U.S. 559 (1881) 19, 21

Parker v. Brown, 317 U.S. 341 (1943) 27

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 14, 20, 27, 28, 30

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 24

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) ... 19, 20

Swin Resources Systems, Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990) 25

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 26

Transportation Co. v. Parkersburg, 107 U.S. 691 (1882) 19, 21

White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) 24, 25

Wyoming v. Oklahoma, 112 S. Ct. 789 (1992) 24

TABLE OF AUTHORITIES – Continued

Page

TABLE OF STATUTES

Federal

42 U.S.C.A. § 9601 *et seq.* 6

42 U.S.C.A. § 6901(a)(4) 13

Local

McKinney's 1991 Laws of New York Ch. 569 27

OTHER AUTHORITIES

All Things Considered, (NPR broadcast, June 13, 1993), *available in* LEXIS, Nexis Library, CURRNT File 18

Alan M. Barnes, *Zoologic Society of London: Surveillance and Control of Bubonic Plague in the United States* 237 (*reprinted by* U.S. Dep't of Health and Human Servs., Pub. Health Serv. No. 50, 1982) 18

Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982) 28

Paul D. Hoeprich, M.D. & M. Colin Jordan, M.D., *Infectious Diseases* 1305 (4th ed. 1984) 18

Bernard C. Nelson et al., *The Complexities at the Interface Among Domestic/Wild Rodents, Fleas, Pets and Man in Urban Plague Ecology in Los Angeles County, California*, Proceedings Twelfth Vertebrate Pest Conference, Univ. of California, Davis 88 (1986) 18

No. 92-1402

In The

Supreme Court of the United States

October Term, 1993

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC. AND ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ Of Certiorari To The
Supreme Court, Appellate Division
Second Department
Of The State Of New York

BRIEF OF AMICUS CURIAE COUNTY OF SAN DIEGO, CALIFORNIA IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The County of San Diego, California (the "County") owns a solid waste disposal system (the "County Disposal System") that provides solid waste disposal service to its 1,400,000 residents generating 1.6 million tons of solid waste per year. It includes five major operating landfills, a major materials recovery (recycling) facility, and more than twenty closed landfills and burn sites that the County formerly used. The County Disposal System

serves vital health and safety interests and depends on "flow control" for its very existence.

I. In San Diego County, solid waste collection and disposal is a public health and safety concern as basic as police, fire, sewage disposal and water supply.

The safe disposal of garbage, trash and refuse and the prevention of disease, obnoxious and dangerous odors, gases and vermin inherent in solid waste is first and last a matter of public health and safety. California counties and cities collect solid waste themselves, make and enforce sanitary ordinances regarding collection, and, when consistent with public health and safety, grant franchises, contracts or permits to private haulers. This latter practice dates from the 1800's and has long been relied on by the County.

Some California governments utilize their own employees to directly provide collection and disposal services themselves. Public service monopolies in solid waste are also created by controlled privatization as well as by the use of municipal labor forces. California allows waste collection and hauling service, based on public interest findings by local government, to be provided exclusively in a particular district by a private company selected by the government. Hauler rates are bid, negotiated and regulated. Under this public utility model, franchises are awarded to the selected hauler upon terms and conditions satisfactory to the local government. Such public service collection, hauling and disposal monopolies have in fact been established by exclusive franchise for all solid waste generated by most of the cities within San Diego County.

Most basic public services, such as police and fire protection, sewage disposal and water supply, are in fact provided by local government monopolies which exclude competitors. Comparison of sewage disposal to waste disposal helps draw the "flow control" issue most sharply. Sewage disposal is ordinarily provided by backyard septic systems or by sewer lines carrying sewage to a central municipal treatment facility. Local government routinely obligates homeowners to cease using septic tanks, hook up to sewer lines provided by a local government monopoly, and pay all attendant costs. Sewage generators and septic tank pumpers are simply not permitted to disregard sewer line hook-up ordinances, evade the monopoly public sewer system and truck the septic pumpings in interstate commerce. Solid waste flow control differs from sewage waste flow control only in that the dangerous wastes move by truck rather than pipe. Haulage vehicles are the conveyance pipes of solid waste. Waste haulers are pipeline operators providing an essential public service.

II. In San Diego County, fundamental public interests are at stake in solid waste disposal decision making.

Safe waste disposal is a basic public need and legal duty of the County and cities in the region. Private industry has no inherent duty to provide this service. Landfills and other major disposal facilities take years from initial planning to commercial operation, a consequence of siting, environmental review and public approval process timelines. Initial planning and permitting costs exceed tens of millions of dollars. Local government cannot discharge its sanitation duty while ignoring these daunting

time and cost realities. If a facility or landfill were to cease operations for any reason, the County simply cannot produce an instant replacement. This development timeline requires long-term planning with reasonable certainty as to how much trash to plan for. Providing oversized facilities squanders precious resources; providing undersized facilities risks being unable to reliably serve excess tonnages. Flow control avoids either untoward result.

The means by which local government chooses to carry out its sanitation responsibilities vary widely, reflecting local facts and circumstances. Elected officials decide the extent and degree to which private sector companies participate in the public service. Management of solid waste involves an array of assets: collection trucks and containers; transfer stations; recycling facilities; compost plants; waste-to-energy facilities; and landfills. It involves numerous classes of waste: single family residential, multi-family residential, commercial, industrial, construction and demolition, yardwaste and household hazardous waste. Government must decide whether municipal forces or private companies will be utilized, providing which assets, handling which class of waste, and serving which district within the region.

Local government has a vital interest in assuring that waste disposal service is reasonably priced. When disposal costs at private East Coast landfills rose sharply in the 1980's from $30 per ton to $125 per ton, many municipalities developed waste-to-energy facilities costing $80 per ton. Private landfill prices have since come down to $45 per ton. On the other end of the pricing scale, it is not uncommon for below cost, "teaser rate" disposal service to be offered to municipal government in an attempt to

induce government to abandon a long-term public disposal project for short term rate relief. These phenomena clearly indicate a great price elasticity, with fees bearing little relationship to costs; private waste industry can raise or lower prices almost at will to serve immediate ends. Government-sponsored landfill or waste-to-energy facilities provide stable and reasonably priced, controlled disposal service on a long-term basis. The County Disposal System operates at cost and is constitutionally, statutorily and contractually required to do so.

Landfills and other waste disposal facilities are heavily regulated by state and federal government. Local government has important and valid public health and safety interests in disposal facility development independent of these regulations. Regional issues are vital. Allotting disposal facilities among communities in the region is basic to the general welfare of the County. Truck traffic, accidents, air pollution, and noise levels resulting from waste haulage and disposal are all sensitive local, health and safety matters.

California mandates that county and city integrated waste management plans include a schedule under which 25% of the wastestream in counties and cities will be recycled and diverted from landfill by 1994, and 50% by 2000. Local communities elect the means and methods of meeting these environmentally beneficial landfill diversion mandates through combinations of curbside recycling, central waste processing and composting alternatives. However, virtually every such diversion choice involves greater total expense than landfilling. For example, San Diego County's materials recovery facility will cost more than three times as much per diverted ton than landfilling. State and local government have thus

made higher cost choices for disposal based on a disfavoring of landfills and the re-use of materials.

The County faces the practical burden and cost of dealing with closed, formerly private landfills in which the County had no prior involvement. Private operators, until recently, were basically free to operate open, unlined dumps. As the dumps filled, regulations tightened and costs increased, the operators abandoned the dumps, leaving local government to deal with what remained. Recourse to the judgment-proof ex-operator for recoupment of costs is generally unavailing. The County also faces multi-million dollar costs of cleaning up and managing the more than twenty closed landfills and former burn sites which it did operate. These future costs from past sanitation activities are justly the responsibility of current ratepayers; hauler evasion of County flow control would disproportionately burden ratepayers served by non-evading haulers. Finally, local governments are liable as responsible parties under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C.A. § 9601, *et seq.* (*B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992)). The County has chosen to build and operate the County Disposal System precisely to monitor and control these risks.

The County's interest in waste disposal monopolization for the protection of the public health and safety is further driven by its concern that the solid waste hauling and disposal industry in its region has been cited for illegal and unethical business practices.

III. San Diego County has made a huge public investment in waste disposal assets in reliance on long settled law giving it the right and responsibility to provide for public sanitation.

The San Diego County Board of Supervisors has formally declared, in a September 1992 policy statement, that waste disposal assets serving the people of San Diego County should be publicly owned, managed or controlled to best serve the public interest. The County's five landfills are publicly owned and controlled. Presently, operations are contracted out and performed by private business. The County's materials recovery facility, expected to be operational in 1993, is privately owned but operated for the exclusive benefit of the County at the County's expense.

Costs of the County Disposal System, in addition to landfill capital and current operating costs and service payments to the materials recovery facility operator, include maintaining large reserves for federal and state-mandated future landfill capping, closure and post-closure monitoring; household hazardous waste collection and disposal; recycling; planning and education; and County sanitation code enforcement. The County's materials recovery facility, built in response to State waste disposal mandates, represents particularly massive and costly investment. The County has contractually committed 550,000 tons of solid waste per year to the facility for 20 years on a "put-or-pay" basis. Project revenue bond debt of $134 million was issued by the facility owner and is secured principally by the County's annual processing fee.

The County operates the County Disposal System through an "enterprise fund" in which solid waste revenues and expenses are accounted for separately from general funds. Enterprise funds and general fund moneys may not be commingled, and enterprise fund moneys must be raised in amounts which are not less nor more than are sufficient to cover County Disposal System costs. Various contract and debt instruments involving hundreds of millions of dollars in payments have been entered into by the County for County Disposal System purposes secured by the enterprise fund. General county taxes are not legally pledged and will not be available to support such limited resource payment obligations.

IV. A decision invalidating Clarkstown's flow control law would threaten the viability of local governments' sanitation systems and deprive them of any realistic means of managing their waste.

The means by which municipal government pays for public monopoly disposal service is a crucial element of local decisionmaking. San Diego County has chosen the user-fee method, where haulers using the County Disposal System pay user fees at the landfill gate. The system is self-sustaining and not taxpayer supported. Such user fee systems, based on tonnage delivered, encourage recycling and other landfill diversion practices. California law restricts government enterprise funds from charging rates in excess of costs; excesses are deemed taxes requiring voter approval.

County Disposal System costs have increased significantly in recent years owing principally to increased landfill regulatory requirements. The tipping fee charged at the County Disposal System to cover these costs has

risen from $8 per ton in 1987 to $43 per ton presently. Costs of the materials recovery facility and landfill improvements are expected to raise the tipping fee to $67 in 1996.

No solid waste generated in San Diego County has historically left California or the County for disposal. Solid waste has flowed to the County Disposal System on an economic basis, since no feasible alternatives existed and none were more economical given transportation and disposal costs. With the projected increase in the County tipping fee, however, such "economic" flow control will no longer be adequate to assure the disposal of County-generated solid waste at the County Disposal System. Haulers will find out-of-County and out-of-State disposal cheaper, at least episodically. With costs rising and tonnage declining the tipping fee will have to be raised to assure the solvency of the enterprise fund. The more the tipping fee increases, the greater the incentive and potential for evasion. This is known in the public finance industry as the "death spiral".

To prevent such a financial collapse, which would prevent the County from meeting its health and safety objectives, the County must be able to make and rely on flow control laws and agreements to require the continued delivery of County solid waste to the County Disposal System. In the unincorporated area, the County will augment its current hauler permit system and grant franchises to private haulers in order to obligate them to haul waste to the disposal site designated by the County. As to waste generated in the cities in San Diego County, waste supply agreements have been executed by fourteen cities obligating them to cause their franchise haulers to continue to deliver all solid waste to the County Disposal

System. Underpinning the viability of the County Disposal System with "legal flow control" in this manner is critical to avoiding the "death spiral" risk to this critical public asset.

SUMMARY OF ARGUMENT

Petitioners and their *amici* argue for the establishment of a constitutional right to pick-up any and all waste (locally generated and otherwise), sort or "remanufacture" it, bail it, and ship it whenever, wherever and to whomever they choose. The argument is advanced broadly as if there were no difference between state conservation efforts to ration or husband access to private landfills and efforts of local governments to assure safe and healthy disposal of all local waste every step along the way, from pick-up through final disposition.

Petitioners argue that, if a municipal government has elected to fulfill such public health and safety duties by employing "flow control", this Court should overlook public health and safety justifications because such a disposal requirement might also allow the municipality to realize monopolistic economies of scale at the expense of excluded carters. Under this view, invalidity follows no matter the range of possible, financial benefits to the responsible government and no matter how speculative the detrimental impact on interstate commerce. Most importantly, invalidity is claimed even though the local government is directly participating through its ownership of or exclusive control over the aggregating means being employed. A risk-averse local government may

never require use of its own facility because such monopolistic use might occasionally or permanently result in public charges in excess of those for private transportation to out-of-state landfills. Even though local residents bear the burden of such higher charges, petitioners claim that mandatory aggregation in collection and disposal is still unwarranted because it might erode a carter's paramount Commerce Clause right to maximize its own receipt of waste removal payments.

The County respectfully suggests that Clarkstown be afforded, in aid of its good faith attempt to properly fulfill its public health and safety duties, freedom of choice between rational alternatives. These include completely prohibiting others from participation in collecting and disposing of waste and compelling permitted waste haulers to collect, handle, transport and deposit the waste only in approved ways. The most relevant prior decisions of this Court validated public health and safety monopolies for the collection and disposal of waste, based upon an arbitrariness standard according great respect for the public health and safety decisions of state and local governments in lawfully establishing such sanitation monopolies. (*California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905)).

> We perceive no ground to doubt the good faith of the Board of Supervisors; nor can we say that the mode adopted for the suppression of the evils in question was arbitrary or did not have a real, substantial relation to the protection of the public health.
>
> . . . .
>
> The State, charged with the duty of safeguarding the health of its people, committed the subject to the wisdom and discretion of the Board of

> Supervisors. The conclusion it reached appears in the ordinances in question, and the courts must accept it, unless these ordinances are, in some essential particular, repugnant to the fundamental law. (*California Reduction Co.*, 199 U.S. at 320-21).

Numerous localities have long modeled their own safe waste disposal solutions upon the San Francisco and Detroit government monopolies which were previously approved by this Court.

> Courts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating and restraining competition among private collectors. *If any area of the law can be said to be well settled, this one is.* (*Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1192 (6th Cir. 1981); emphasis added).

Nothing in Commerce Clause jurisprudence suggests that such municipal public health and safety monopolies have now somehow fallen outside of the spectrum of good faith alternatives available to the primarily responsible local government. Indeed, decisions before and after 1905 involving analogous direct governmental participation have been held beyond the reach of potential dormant Commerce Clause invalidation.

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992), *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992) and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) hold only that neither the responsible state nor local government can prohibit or restrict the disposal of wastes at privately owned landfill sites that were originally generated, collected and shipped elsewhere, at least not without equivalent application to local wastes as well. Nowhere in any

of these decisions is it seriously suggested that there is any "free market" philosophy which would ever justify a judicial veto of a local decision to build a facility designed for disposal of 100% of locally-generated waste, and supported by a legal or contractual requirement that all such waste be disposed of at the facility.

Due respect for the principles of federalism in this quintessentially "local" waste disposal area suggests an enthusiastic vote of confidence in local government. Of course, Congress could retreat from its endorsement of the longstanding federal collective judgment that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies," 42 U.S.C.A. § 6901(a)(4). Until then, however, this Court should continue to entrust at least this much of the problem of waste disposal to those local governments "primarily" responsible for and actually participating in the collection and disposal of such waste.

Anything less invites the burdens and delays of review by injunction of every such local monopolizing governmental decision. Such inordinately expensive inquiries must occur when Congress has acted. But here, Congress has for more than a century totally endorsed the anti-competitive effects of local government public health and safety waste monopolies. This Court has never held these effects barred by the co-extensive reach of the Sherman Act.

The very waste disposal market itself is largely the product of the imposition by local government of lawful disposal duties upon local waste possessors. The same local government participates directly through a public health and safety monopoly in removing and disposing of

the waste. Nothing in the substantially congruent Commerce Clause or Sherman Act jurisprudence compels any "balancing" review of any aspect of these governmental actions. No matter how extreme may be the economic harm to the excluded potential competitor, such harm will never truly outweigh the public health and safety *raison d'être* for establishing the governmental waste monopoly. Alternatively, even under the Court's *Pike v. Bruce Church* balancing test, the Clarkstown flow control system is valid.

ARGUMENT

I. LOCAL GOVERNMENTAL MONOPOLIES HAVE LONG SERVED THE ENDS OF PUBLIC HEALTH AND SAFETY BY REMOVING AND DISPOSING OF IMMEDIATELY DANGEROUS WASTE WITHIN THEIR BORDERS. LONG SETTLED CONSTITUTIONAL PRINCIPLES SUSTAIN SUCH PUBLIC HEALTH AND SAFETY MONOPOLIES DESPITE THEIR ANTI-COMPETITIVE EFFECTS.

Petitioners argue that the "economic protectionism" or "free trading" concept embedded in this Court's Commerce Clause jurisprudence secures to them a right to compete with Clarkstown for waste within its borders, whether generated by Clarkstown's citizenry or otherwise. They argue that no local government could decide to participate directly in the actual delivery of such a concededly essential public health service – timely collection and disposal of municipal waste – without also having to compete directly with private industry in the rendering of such services. No local government can ever be permitted to decide to provide such services with

respect to *all* waste within its borders, unless the decision is justified by *pure* public health reasons, untainted by the specific economic goal or benefit of reducing the overall cost to the host municipality and its taxpayers.

Under petitioners' openly competitive model, local governments must predict the amount of waste to be collected and disposed of under free market forces, size collection fleets and necessary facilities to handle safely such estimates and then let the market forces reign. Should spot market prices surpass those of the public entities, undersized governmental systems could become unable to dispose of waste for which they did not plan. Unlike the government, private carters remain free to elect *not* to collect and dispose of waste when profits are unavailing. Episodic withdrawals of the private sector leave all risk to the public, whose workforce and facilities may not be capable of handling such abandoned waste. Early decisions sizing municipal plants and workforces for 100% of all predicted waste would go far to prevent such a lack of capability. But the inability to control waste flow would soon render uneconomic such oversized facilities and thereby inflict substantial economic harms upon the public. No prior decision of this Court suggests in any way that a risk-averse local government cannot avoid such harms by a decision to compel collection and disposal of *all* waste within its borders.

A. Governmental public health monopolization of the disposal of solid waste was long ago constitutionally validated by this Court. The disease avoidance reason remains wholly unchanged and current.

Historically, public health monopolizing decisions have often been thought necessary for a local government to attract private capital to assist it in providing such an essential public service. Indeed, municipal grants or awards of waste collection and disposal monopolies have long had an honorable place in the history of waste disposal. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) and *Gardner v. Michigan*, 199 U.S. 325 (1905) each upheld injunctions enforcing municipal awards of exclusive collection and disposal monopolies over competitors claiming "due process" objections and correlative rights either to continue competing or to be compensated for such an alleged taking of their private property for public use. This Court's ninety-year-old understanding and description of the dimensions of the municipal collection and waste disposal challenge, the chosen monopolization solution and the carters' claims remains wholly current and incisive:

> [T]he municipal authorities might well have doubted whether the substances that were *per se* dangerous or worthless would be separated from such as could be utilized and whether the former would be deposited by the scavenger at some place that would not endanger the public health. They might well have thought that the safety of the community could not be assured unless the entire mass of garbage and refuse, constituting the nuisance, from which the danger came, was carried to a crematory where it could be promptly destroyed by fire; and thus

> minimize the danger to the public health. (*California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. at 323).

California Reduction and *Gardner* remain as compelling and persuasive as ever. Recently *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981) rejected efforts identical to petitioners', to distinguish *California Reduction* and *Gardner*:

> The plaintiffs and the American Paper Institute argue, however, that the increased value of wastes and the City's appropriation of that value render the old cases anachronisms that should be set aside. They argue that changed economic circumstances and heightened environmental concern make separating and selling such recyclable wastes as metal, paper and cardboard more feasible now than in the past. They point out that there now exist competitive markets for recyclable wastes. They argue that Akron's purpose in acquiring a monopoly over garbage is not public health, as was the purpose in the old cases, but rather making its energy plant more profitable by insulating it from competition for raw materials. A monopoly imposed for that purpose, they argue, is neither necessary nor efficient.
>
> *The old cases are not anachronisms. They are not distinguishable on any of these grounds. The solid waste disposal problem is as serious today for cities as in the past, perhaps more serious.*
>
> . . . .
>
> Neither does the fact that the City appropriates the value and sells some of the recyclable waste, or chooses in manufacturing energy to burn some of the paper and cardboard rather than to resell it, distinguish the old cases. *Under these cases, the City could simply have taken over all garbage collection as in San Francisco, Detroit and*

Cincinnati, depriving existing collectors of any business at all.

. . . .

In each of the cases discussed above the city granted a monopoly right to collect garbage to a single company, permitting that company alone to engage in a profitable business that had previously been done by several firms. The courts held that the public interest in regulation of garbage was so great that monopolization of the service and the attendant transfer of profits did not violate the taking or due process clause. (*Hybud*, 654 F.2d at 1193-94; emphasis added).

The County respectfully submits that adherence to these municipal waste precedents is both necessary and advisable. For example, while the last bubonic plague outbreak occurred in Los Angeles in 1924, the danger "is still a threat in several Western States, including New Mexico, Arizona, Colorado, California and Oregon." (*All Things Considered*, (NPR broadcast, June 13, 1993), *available in* LEXIS, Nexis Library, CURRNT File; Paul D. Hoeprich, M.D. & M. Colin Jordan, M.D., *Infectious Diseases* 1305 (4th ed. 1984) ("The primary preventive or suppression measures against urban plague consists of *rigorous environmental sanitation* aimed at reducing or eliminating commensual rodent populations, particularly rats and their fleas." (emphasis added)); Alan M. Barnes, *Zoologic Society of London: Surveillance and Control of Bubonic Plague in the United States* 237 (*reprinted by* U.S. Dep't of Health and Human Servs., Pub. Health Serv. No. 50, 1982); Bernard C. Nelson et al., *The Complexities at the Interface Among Domestic/Wild Rodents, Fleas, Pets and Man in Urban Plague Ecology in Los Angeles, County, California*, Proceedings Twelfth Vertebrate Pest Conference, Univ. of California, Davis 88 (1986)). Prevention of disease is the

continuing, core reason for reaffirming the validity of *California Reduction* and *Gardner*.

B. The receipt of financial benefits by actively participating local governmental public health monopolies does not render them subject to Commerce Clause review.

Throughout our history local governmental monopolies have regularly been used to attract private capital to public ends. Much of what is now referred to as infrastructure was originally built and operated through such municipal monopoly grants, monopolies which both competitors and paying customers regularly and broadly attacked as unconstitutional. (*E.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *Hutcheson v. City of Valdosta*, 227 U.S. 303 (1913); *District of Columbia v. Brooke*, 214 U.S. 138 (1909); *Ouachita Packet Co. v. Aiken*, 121 U.S. 444 (1887); *Morgan's Steamship Co. v. Louisiana Bd. of Health*, 118 U.S. 455 (1886); *Transportation Co. v. Parkersburg*, 107 U.S. 691 (1882); *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881)). None of the wide-ranging full scale constitutional assaults on the anti-competitive effects of such municipally established monopolies ever succeeded in overcoming a public health and safety justification.

> "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be

made subservient to the general interests of the community."

. . . .

In *Gibbons v. Ogden*, Chief Justice Marshall, speaking of inspection laws passed by the States, says: "They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the General Government – all of which can be most advantageously administered by the State themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts." (*Slaughter-House Cases*, 83 U.S. (16 Wall.) at 62-63 (citations omitted)).

No such monopoly case ever held that indisputably strong public health and safety legislative purposes are overridden by detrimental impacts upon interstate commerce. Indeed, *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) suggested that "balancing" may not even be necessary when dealing with the public health and safety, i.e. "We are not, then, dealing here with 'state legislation in the field of *safety* where the propriety of local regulation has long been recognized.' " (*Id.* at 143 (citation omitted)). These same decisions uniformly held that such government public health monopolies, quintessentially in "works and improvements of a local character", were substantially impervious to review by the federal courts under the Commerce Clause.

> In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States cannot, as such, interfere with the regulations made by the State, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded,

> or for the services rendered under state authority. It is for Congress alone, under its power to regulate commerce with foreign nations and among the several states, to correct any abuses that may arise, or to assume to itself the regulation of the subject. (*Ouachita Packet Co. v. Aiken*, 121 U.S. 444, 447-48 (1887)).

The financing of these local public health and safety solutions necessitated and justified their monopolizing features. For example, the requirement that Ohio river steamers *exclusively* use the town wharf, instead of the river bank within its borders, was upheld as a coercive municipal monopoly permissible under the Commerce Clause. (*Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881)). More recently, *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), upheld local airport charges through the application (citing *Parkersburg* and other such cases) of the financing considerations which ultimately justify this principle.

> We therefore regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed upon interstate and domestic users alike. (*Id.* at 714).

These settled Commerce Clause principles have long been relied upon by many local governments in establishing monopolies to carry out their public duties including especially monopolies in the collection and disposal of waste. The County respectfully suggests that while time has passed, the dangers have not, and therefore a different result is unwarranted.

II. NOTHING IN THE COURT'S RECENT PRIVATE LANDFILL DECISIONS SUGGESTS ANY ALTERATION OF THE CONSTITUTIONAL PRINCIPLES PREVIOUSLY VALIDATING GOVERNMENTAL WASTE MONOPOLIES.

The recent decisions of this Court invalidating efforts to conserve local disposal space by excluding out-of-state waste do not diminish in any way the traditional force accorded to the public health or financing needs underlying "flow control" monopolization by the local waste collecting and disposing jurisdiction. None of the values animating these decisions is impaired in any way by the continued validation of municipal collection and disposal monopolies.

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992), *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992) and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), invalidated laws discriminatorily restricting access to privately owned landfills to local residents only unless special permissions were obtained or special fees paid. These landfills had previously served both their host communities and out-of-state exporting communities. The receiving governments argued that their closure laws were justified by long term conservation considerations rather than immediately threatening public health concerns. None of these cases had anything to do with a health and safety decision by a principally responsible government actively engaged in the collection and disposal of solid wastes. Moreover, each case either reserved decision on the point of or explicitly suggested that the opposite conclusion would have resulted had there been any imminent public health or safety basis for even a

discriminatory decision. (*Philadelphia v. New Jersey*, 437 U.S. at 628-29 ("There has been no claim here that the very movement of waste into or through New Jersey endangers health. . . . "); *Fort Gratiot Sanitary Landfill, Inc.*, 112 S. Ct. at 2027 ("Of course, *our conclusion would be different* if the imported waste raised health or other concerns not presented by Michigan waste." (emphasis added)); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. at 2015 ("There is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama. . . . ")).

Clarkstown's decision to centralize waste collection through a single facility was based on compelling health and safety evidence aired at a public hearing (J.A. at 34-68), and the equally compelling planning necessity to carry out that decision through a non-discriminatory monopolizing requirement which limited the potentially harmful waste to that single location. Here, therefore, there is little basis for condemning the Town's decision on the basis of the Court's prior rejection of long-term conservation as an acceptable rationale for placing all burdens on out-of-state interests.

Although Clarkstown's monopoly offers possible financial advantage through bulk purchase of transportation and landfill services, there is nothing in any of these landfill conservation decisions which suggests that any such financial benefit would ever render *bona fide* public health and safety monopolies subject to dormant Commerce Clause invalidation. Indeed, *Philadelphia v. New Jersey* and *Fort Gratiot* each expressly disclaimed an expression of opinion as to the appropriateness of actions taken by receiving municipalities to conserve their own

facilities. (*Philadelphia v. New Jersey*, 437 U.S. at 627-628 n.6; *Fort Gratiot Sanitary Landfill, Inc.*, 112 S. Ct. at 2023).

In the final analysis, these cases only teach that the burden of conserving a shrinking disposal resource must not be placed entirely on out-of-state interests. The discriminatorily priced access and total exclusion of outside waste evaluated in these prior decisions left the burden on out-of-state users. Thus, a benefit was transferred to in-state users who were not shown to have used public resources on behalf of the privately owned landfill businesses in furtherance of the particular conservation policy under scrutiny.

A. The market participant doctrine independently supports the propriety of reaffirming *California Reduction* and *Gardner* and their *per se* validation of municipal waste monopolies.

The market participant doctrine serves as an independent basis for the *per se* validation of flow control laws enacted by a responsible local government where it is actively participating in the collection and disposal of municipal solid waste through monopolistic controls having both public health and public finance benefits. (*Wyoming v. Oklahoma*, 112 S. Ct. 789 (1992); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)). The County respectfully suggests that this rule is wholly consonant with *California Reduction* and *Gardner* and should now expressly be extended to include municipal solid waste monopolies.

A government's investment of time, effort and funds in such an integral operation as sanitary waste disposal

presents a most compelling need for the freedom to exclude competition in an effort to protect the public fisc through non-discriminatory user fees designed to pay for that investment. The older monopoly cases repeatedly upheld such exclusivity choices for essentially the same "sovereignty" reasons as ultimately underlie recent market participation cases. If the State may control use of its own cement plants, it would seem that more flexibility, not less, should be accorded it in making financial commitments to carry out operations in more traditional health and safety areas. (*White*, 460 U.S. 214-215). The monopolizing requirement here at issue has had a long and honorable history of effective use in facilitating a most necessary governmental task.

Nothing in the market participation cases suggests inapplicability to Clarkstown's municipal disposal monopoly and the five year put-or-pay financing commitment which it made to the operator of its transfer facility. If sufficient waste is produced annually, no direct Clarkstown payments will be required; if insufficient, Clarkstown must pay. Such financing guarantors participate in most marketplaces. Governmental assurances of performance are often necessary to induce construction lenders to advance funds to build facilities.

Swin Resources Systems, Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990) upheld a local county's market participant status in the operation of its landfill. And, while there are some differences, of course, between a local government's operation of its transfer station and its landfill, the more meaningful similarities would seem to favor a market participation conclusion for the former. Purely as a commercial

matter, the aggregation of waste affords Clarkstown possible economies of scale in purchasing transportation and landfill services. Such vital trading advantages were recognized in *J. Filiberto Sanitation v. Department of Environmental Protection*, 857 F.2d 913 (3d Cir. 1988):

> The transfer station is the county's only disposal facility. As such it is irreplaceable. As a centralized depository, it is the basis of the county's ability to plan and execute long- and short-term disposal arrangements. As such, it is indispensable. (*Id.* at 922).

The County respectfully submits that the basic reason for the rule embodied in this Court's market participation decisions wholly justifies its application to the Clarkstown participation in waste collection and disposal through its transfer station, its financially sustaining put-or-pay commitment and the chosen "flow control" means of fulfilling it.

B. This Court's prior *per se* immunization of municipal sewer monopolies under the Sherman Act is consistent with a declination to now require balancing inquiries under the Commerce Clause.

Because the ultimate goals being served by both Sherman Act and dormant Commerce Clause jurisprudence are the same, this Court's *per se* immunization in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) of municipal sewer monopolies under the Sherman Act should support, by analogy, a consistent *per se* immunity under the Commerce Clause. If a court should hesitate to uphold *per se* immunity under the Sherman Act for some government business monopolies not presenting genuine safety and health needs (see, e.g. *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982)), it should be

equally hesitant under the Commerce Clause; in both cases the need for a rule of reason type of balancing inquiry with all of its attendant transaction costs may be justified by the more detailed and comprehensive economic understandings potentially available.

Here New York State has indisputably authorized Clarkstown to impose "appropriate and reasonable limitations" on "competition" by requiring "that *all* solid waste" no matter its origins "shall be delivered to a specified" facility. (Rockland County – Solid Waste Treatment and Disposal Act, ch. 569, McKinney's 1991 Laws of New York, p. 1072.) Clarkstown's wholly authorized equitable ownership and exclusive use of the facility should be more than sufficient to make it such a constitutionally valid "actor" within the meaning of the federalism concepts which underlay sovereign immunity under the Sherman Act. (*Parker v. Brown*, 317 U.S. 341 (1943); *Olsen v. Smith*, 195 U.S. 332 (1904); *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949 (6th Cir. 1984)).

III. LOCAL GOVERNMENT WASTE MONOPOLIES ARE VALID WHEN BALANCED UNDER THE *PIKE V. BRUCE CHURCH* TEST

Even if municipal waste disposal systems are not validated on the ground of a municipal waste disposal *per se* exception to dormant Commerce Clause invalidation, or on the basis of the market participant doctrine, they are still valid under a *Pike v. Bruce Church* analysis. Flow controls are challenged as export restrictions on a par with, or are the "flip side" of, the import restrictions struck down by this Court in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In fact, Clarkstown does not bar the export of solid waste. Clarkstown requires that

solid waste first be brought to a town-operated transfer facility; after delivery export out of state is not only possible, but is intended. The Clarkstown ordinance regulates even-handedly; it neither precludes the entry nor the departure of waste from the jurisdiction *as such*.

> Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its efforts on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. (*Pike v. Bruce Church*, 397 U.S. 137 (1970)).

Dormant commerce clause challenges to local government solid waste regulation span a wide variety of solid waste systems across the country. Flow control in Clarkstown requires the delivery of waste to a designated site; exportation outside the county is not prohibited. Fundamentally, however, interstate commerce is not being discriminated against.

Here, petitioners actually objected to Clarkstown's enactment of the challenged local regulation; however, because they constitute in-state and local interests their claim for protection is necessarily weak. (Eule, *Laying the Dormant Commerce Clause to Rest*, 91 Yale L.J. 425 (1982)).

The lack of identifiable adverse consequences to interstate commerce, incidental or otherwise, suggests a speculative burden on interstate commerce that should not be deemed to override indisputably substantial local interests. (*Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981) (held that burden on out-of-state plastics manufacturer was outweighed by state's solid waste disposal interest in banning use of plastic non-returnable milk containers); *Milk Control Board v. Eisenberg Farm Products*, 306 U.S. 346, 353 (1939) (upheld in-state price

control as applied to exports to an out-of-state purchaser)).

What is critical in this case, therefore, is that the local benefits in terms of safety, health, the environment and fiscal well-being are clearly substantial. The Clarkstown transfer facility may even speed the ultimate entry of waste into interstate commerce. Such incidental or marginal effects on interstate commerce produced by regulation directed almost entirely to internal public health and safety concerns should be held insufficient for invalidation under the dormant Commerce Clause.

CONCLUSION

In matters of local public health and safety, such as waste disposal, local sovereignty should normally result in the judicial validation of the establishment of local government monopolies.

Fundamentally powerful federalism principles counsel against petitioners' requests to extend this Court's three private landfill conservation decisions backwards to the local government ultimately responsible for collecting and disposing of the waste. Here, literally thousands upon thousands of *bona fide* local monopolizing judgments are constantly being made and adjusted in response to the ever-changing local waste disposal needs. Such acts need not discriminate between states. Private disappointed expectancy claims, like petitioners', will be ubiquitous unless limited to prosecution on other than dormant Commerce Clause grounds. The County of San Diego respectfully commends to this Court that it create a *per se* safe-harbor where local government waste monopolies may operate free of any duty to subordinate their

governmental functions to those of interstate carters. Similarly, the Court could implement these concerns by validating local government waste monopolies under the market participant doctrine or the *Pike v. Bruce Church* balancing test.

For these reasons, the decision below should be affirmed.

Respectfully Submitted,

LLOYD M. HARMON, JR.
County Counsel
Counsel of Record
County of San Diego
DIANE BARDSLEY
Chief Deputy County Counsel
SCOTT H. PETERS
Deputy County Counsel
355 County Administration Center
1600 Pacific Highway
San Diego, CA 92101-2469
(619) 531-4860

Of Counsel,

W. CULLEN MACDONALD
ERIC S. PETERSEN
JEANNE M. SINCLAIR
HAWKINS, DELAFIELD & WOOD
67 Wall Street
New York, NY 10005
(212) 820-9333

JEROME A. BARRON
George Washington University
National Law Center
720 - 20th Street, N.W.
Washington, D.C. 20006
(202) 994-6954

No. 92-1402

In the Supreme Court of the United States

OCTOBER TERM, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

BRIEF OF *AMICI CURIAE* SOLID WASTE ASSOCIATION OF NORTH AMERICA, BRISTOL RESOURCE RECOVERY FACILITY OPERATING COMMITTEE (CONNECTICUT), CONNECTICUT RESOURCES RECOVERY AUTHORITY, ISLIP RESOURCE RECOVERY AGENCY (NEW YORK), LANCASTER COUNTY SOLID WASTE MANAGEMENT AUTHORITY (PENNSYLVANIA), MONTEREY REGIONAL WASTE MANAGEMENT DISTRICT (CALIFORNIA), COUNTY SANITATION DISTRICTS OF LOS ANGELES COUNTY (CALIFORNIA), SOLID WASTE AUTHORITY OF CENTRAL OHIO, SOLID WASTE AUTHORITY OF PALM BEACH COUNTY (FLORIDA), SOUTHEAST ALABAMA SOLID WASTE DISPOSAL AUTHORITY, SOUTHEASTERN PUBLIC SERVICE AUTHORITY OF VIRGINIA, SPOKANE REGIONAL SOLID WASTE DISPOSAL PROJECT (WASHINGTON) IN SUPPORT OF RESPONDENT

BARRY S. SHANOFF
Counsel of Record
KNOPF & BROWN
1050 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 785-8200
Counsel for Amici Curiae
(Additional counsel listed on inside cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

ROBERT A. MICHALIK
Eisenberg, Anderson, Michalik & Lynch
P.O. Box 2950
New Britain, CT 06050
Counsel for Bristol Resource Recovery Facility Operating Committee

ROBERT E. WRIGHT
Executive Vice President and General Counsel
179 Allyn Street
Hartford, Connecticut 06103
Counsel for Connecticut Resources Recovery Authority

MICHAEL J. CAHILL
Sinnreich, Wasserman, Grubin & Cahill
1939 Veterans Memorial Highway
Suite 216N
Hauppage, New York 11788
Counsel for Islip Resource Recovery Agency

GEORGE T. BRUBAKER
Hartman, Underhill & Brubaker
221 East Chestnut Street
Lancaster, Pennsylvania 17602
Counsel for Lancaster County Solid Waste Management Authority

ROBERT R. WELLINGTON
857 Cass Street—Suite D
Monterey, California 93940
Counsel for Monterey Regional Waste Management District

B. RICHARD MARSH
Knapp, Marsh, Jones & Doran
515 South Figueroa Street
Suite 1400
Los Angeles, California 90071
Counsel for County Sanitation Districts of Los Angeles County

JOHN C. DOWD
Squire, Sanders & Dempsey
4900 Society Center
127 Public Square
Cleveland, Ohio 44114-1304
Counsel for Solid Waste Authority of Central Ohio

LEE A. ROSENTHAL
7501 N. Jog Road
West Palm Beach, FL 33412
Counsel for Solid Waste Authority of Palm Beach County

PETER M. HUBER
Willcox & Savage, P.C.
1800 Nationsbank Center
One Commercial Place
Norfolk, Virginia 23510-2197
Counsel for Southeastern Public Service Authority of Virginia

ROBERT D. THORINGTON
Thorington & Gregory
P.O. Box 1738
Montgomery, Alabama 36109
Counsel for Southeast Alabama Solid Waste Disposal Authority

JAMES S. SLOANE
808 West Spokane Falls Blvd.
Spokane, Washington 99201
Counsel for Spokane Regional Solid Waste Disposal Project

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	2
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. MANDATORY DISPOSAL OF LOCALLY GENERATED SOLID WASTES AND RECYCLING RESIDUES AT GOVERNMENT-SPONSORED FACILITIES SERVES AND EFFECTUATES LEGITIMATE LOCAL INTERESTS	7
A. Local Governments Have an Obligation To Protect Public Health and the Environment	7
B. Flow Control Protects Public Health and the Environment and Preserves Resources	8
C. Flow Control Assures Oversight and Continuity of Management and Care for Systems and Facilities	9
II. THE TOWN'S FLOW CONTROL MEASURE IS EVENHANDED AND DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE EITHER DIRECTLY OR IN PURPOSE AND EFFECT	11
A. Local Law 9 Is Not a Protectionist Measure That Burdens Out-of-State Economic Interests	12
B. Pervasive and Historic State and Local Regulation of Solid Waste Should Be Treated Differently From Overt Economic Measures and Should Be Accorded a Presumption of Validity	14
CONCLUSION	20

TABLE OF AUTHORITIES

Cases: Page

Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935) 18
B.F. Goodrich v. Murtha, 958 F.2d 1192 (2d Cir. 1992) 10
Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959) 13, 17, 18
Breard v. Alexandria, 341 U.S. 622 (1951) 16
California Reduction Co. v. Sanitary Reduction Works of San Francisco, 199 U.S. 306 (1905) 7, 19
Central Iowa Refuse Systems, Inc. v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983) *cert. denied* 471 U.S. 1003 (1985) 7
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 11, 12, 17
Gardner v. Michigan, 199 U.S. 325 (1905) 19
Georgia v. Tennessee Copper Co., 206 U.S. 230 (1906) 15
Hughes v. Oklahoma, 441 U.S. 322 (1979) ...11, 12, 13, 19
Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960) 16, 19
Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated and remanded on other grounds*, 455 U.S. 931 (1982), *aff'd on remand*, 742 F.2d 949 (6th Cir. 1984) *cert. denied*, 471 U.S. 1004 (1985) 7-8
J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Environmental Protection, 857 F.2d 913 (3d Cir. 1988) 9
Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662 (1981) 18
Maine v. Taylor, 477 U.S. 131 (1986) 16, 18
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 12, 15-16
Parker v. Brown, 317 U.S. 341 (1943) 19
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 11, 12, 13, 18
Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429 (1978) 12-13, 18
South Carolina State Highway Dept. v. Barnwell Bros., Inc., 303 U.S. 177 (1937) 13

TABLE OF AUTHORITIES—Continued

Page

Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) 17
Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) 16
Transportation Leasing Co. v. California, No. CV-89-7368-WMB (GHKx) (C.D. Cal. Sept. 24, 1991) 10-11
Transportation Leasing Co. v. California, No. CV-89-7368-WMB (GHKx) (C.D. Cal. July 21, 1992) 10
United States v. Carolene Products Co., 304 U.S. 144 (1938) 17

Statutes:

42 U.S.C. §§ 6901-6987 ..... 14, 17, 19, 20
42 U.S.C. § 6901(a)(3) 14
42 U.S.C. § 6901(a)(4) 14
42 U.S.C. §§ 6941-6949 14
42 U.S.C. § 6941 14
42 U.S.C. § 6943 15
42 U.S.C. § 9601(21) 10

Regulations:

40 C.F.R. § 258.20 8

Legislative Materials:

H.R. Rep. No. 1491, 94th Cong., 2d Sess. 9-11, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6247-49 15
H.R. Rep. No. 1491, 94th Cong., 2d Sess. 32-36, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6270-73 15
H.R. Rep. No. 1491, 94th Cong., 2d Sess. 7, 88-93, 102-103, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6244-45, 6323-29, 6337-39 15

Miscellaneous:

U.S. Const., art. I, § 8, cl. 3 ..... *passim*
U.S. Const., art. VI, cl. 2 19

TABLE OF AUTHORITIES—Continued

	Page
U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action* (1988)	2, 5
McQuillin Mun Corp § 24.242 (3rd Ed)	8
McQuillin Mun Corp §§ 24.248, .251, .255 (3rd Ed)	8

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1402

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

BRIEF OF *AMICI CURIAE* SOLID WASTE ASSOCIATION OF NORTH AMERICA, BRISTOL RESOURCE RECOVERY FACILITY OPERATING COMMITTEE (CONNECTICUT), CONNECTICUT RESOURCES RECOVERY AUTHORITY, ISLIP RESOURCE RECOVERY AGENCY (NEW YORK), LANCASTER COUNTY SOLID WASTE MANAGEMENT AUTHORITY (PENNSYLVANIA), MONTEREY REGIONAL WASTE MANAGEMENT DISTRICT (CALIFORNIA), COUNTY SANITATION DISTRICTS OF LOS ANGELES COUNTY (CALIFORNIA), SOLID WASTE AUTHORITY OF CENTRAL OHIO, SOLID WASTE AUTHORITY OF PALM BEACH COUNTY (FLORIDA), SOUTHEAST ALABAMA SOLID WASTE DISPOSAL AUTHORITY, SOUTHEASTERN PUBLIC SERVICE AUTHORITY OF VIRGINIA, SPOKANE REGIONAL SOLID WASTE DISPOSAL PROJECT (WASHINGTON) IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

The Solid Waste Association of North America ("SWANA") is a nonprofit educational organization serving individuals and communities that manage and operate municipal solid waste management systems. Dedicated to the advancement of professionalism in the field, SWANA offers its members a variety of training programs, technical assistance and educational opportunities to meet their ever-growing needs. Founded in the 1960s as the Governmental Refuse Collection and Disposal Association, SWANA has become the largest member-based solid waste management association in the world. The overwhelming majority of SWANA members are municipal, county and regional public officials who are responible for managing municipal solid waste systems that are government-owned or government-sponsored.[1] Other SWANA members include private sector companies and firms that provide systems, equipment, and consulting services in the field of solid waste management.

The other *amici* joining in this brief are municipal and regional public agencies and special authorities who are responsible for the day-to-day management of a growing and diverse solid waste stream.

The Bristol Resource Recovery Facility Operating Committee includes the cities of New Britain and Bristol and the towns of Plainville, Burlington, Southington, Plymouth, Branford, Hartland, Prospect, Warren, Washington, Wolcott, Berlin and Seymour who are represented by their respective mayors, first selectpersons or town managers on the Committee. These local governments are parties to a service agreement with a privately owned waste-to-energy facility owner-operator.

---

[1] Municipal solid waste management "is primarily a local responsibility" and few, if any, responsibilities are more integral to local government. *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action* (1988).

The Connecticut Resources Recovery Authority ("CRRA") consists of some 113 cities and towns that participate in CRRA's four waste-to-energy projects. CRRA owns and operates recycling facilities, landfills and transfer stations.

The Islip Resource Recovery Agency includes the Town of Islip and the following villages: Islandia, Brightwaters, Saltaire and Ocean Beach. The Agency owns an incinerator, and owns and operates composting and recycling facilities, as well as landfills.

The Lancaster County Solid Waste Management Authority serves 60 municipalities within the county and all remaining portions of the county. The Authority owns an incinerator and recycling facilities, and owns and operates landfills, transfer stations, and household hazardous waste management facilities.

The Monterey Regional Waste Management District includes the cities of Carmel, Del Ray Oaks, Marina, Monterey, Pacific Grove, Sand City and the following areas: Big Sur, Carmel Highlands, Pebble Beach, Carmel Valley, Castroville, Corral del Tierra, Laguna Seca, Moss Landing, San Benancio, and Toro Park. The District's primary function is to dispose of solid waste in the Monterey Peninsula area. The District's role has recently expanded to include the recovery of recyclable materials in the wastestream, including cardboard, newspaper, glass, woodwaste, plastics, metals, concrete, asphalt, reusable building materials and resale items. The District also receives some of Monterey County's non-hazardous liquid wastes. The first landfill-gas-to-electrical-energy system in Central California was installed at the disposal site in 1983. More than 1,200 kw of continuous power are currently being generated.

The County Sanitation Districts of Los Angeles County are a confederation of 27 special districts, each having its own board of directors consisting of the presiding

officers of the local jurisdictions within the district. The districts include 79 cities and unincorporated areas. The districts own and operate recycling facilities, landfills and transfer stations, and jointly own and operate (with other governmental agencies) refuse-to-energy facilities.

The Solid Waste Authority of Central Ohio includes the following municipalities, townships and other political subdivisions: City of Bexley; Village of Brice, Village of Canal Winchester; City of Columbus; City of Dublin; City of Gahanna; City of Grandview Heights; City of Grove City; Village of Groveport; Village of Harrisburg; City of Hilliard; Village of Lockbourne; Village of Marble Cliff; Village of Minerva Park; Village of New Albany; Village of Obetz; City of Reynoldsburg; Village of Riverlea; City of Upper Arlington; Village of Urbancrest; Village of Valleyview; City of Westerville; City of Whitehall; City of Worthington; Blendon Township; Brown Township; Clinton Township; Franklin Township; Hamilton Township; Jackson Township; Jefferson Township; Madison Township; Mifflin Township; Norwich Township; Perry Township; Plain Township; Pleasant Township; Prairie Township; Sharon Township; Truro Township; and Washington Township. The Authority owns composting, tire processing and general recycling facilities, operates an incinerator, transfer station and household hazardous waste program, and owns and operates landfills.

The Solid Waste Authority of Palm Beach County serves all incorporated and unincorporated areas of the county. The Authority owns composting and recycling facilities, landfills, transfer stations and incinerators.

The Southeast Alabama Solid Waste Disposal Authority includes the counties of Dale, Geneva, Henry, and Houston, and all municipalities therein except for the city of Dothan. Its managing board is appointed by the governing bodies of the participating political subdivisions.

The Authority owns and operates a landfill and transfer stations.

The Southeastern Public Service Authority of Virginia consists of the cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk and Virginia Beach, and the counties of Isle of Wight and Southhampton. The Authority owns and operates incinerators, composting and recycling facilities, tire shredders, a ferrous metal plant, a refuse-derived-fuel plant, landfills and eight transfer stations.

The Spokane Regional Solid Waste Disposal Project serves Spokane County and all incorporated areas therein. The Project owns an incinerator and a compost facility, and owns and operates recycling facilities, landfills, transfer stations and a household hazardous waste collection program.

These governmental *amici* meet their respective solid waste management obligations by promoting and utilizing sound and prudent practices to further public health, environmental sensitivity and economic stability. EPA encourages local communities to employ an "integrated waste management" approach to solid waste planning using a combination of four alternatives—source reduction (*i.e.*, reducing the amount of waste generated), recycling, waste combustion with energy recovery, and landfilling. U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action* (1988), p. 2. EPA recognizes that every community must " 'custom-design' its integrated waste management system" in order to meet local environmental, economic and institutional needs. *Id.* at 16.

For the *amici,* flow control is a rational, nondiscriminatory mechanism for the interactive and complementary use of these waste management methods as part of an environmentally sound strategy for municipal solid waste management.

SUMMARY OF ARGUMENT

While Congress and state legislatures have respectively set national and state solid waste management policy, the combined effect of the resulting laws places the burden of implementation squarely on local governments and solid waste special service authorities.

Consistent with national and state goals, these local jurisdictions and agencies are entitled to shape programs and strategies for efficient and environmentally sound methods—and combinations of methods—to manage municipal solid waste. Local governments and solid waste management authorities are spending sizable sums of money trying to deal with the management of municipal solid waste. In response to changing federal and state mandates and increasingly strong public support, local government units are turning to management strategies that integrate a mix of solutions: promoting waste reduction; recycling and composting; recovering energy from waste; and landfilling.

Local government's historic obligation to protect public health and safety has taken on a new dimension and meaning in the late 20th Century: protection of the environment. Indeed, courts from Connecticut to California are ruling that local governments are legally liable, and thus financially responsible, for any adverse consequences of municipal solid waste management—regardless of fault or what other parties may have done.

Hence, local municipal solid waste managers must have authority commensurate with their responsibilities. If local government is obliged to plan and implement sophisticated and responsive integrated municipal solid waste management systems, then local officials must have an assortment of tools and instruments from which to choose in shaping appropriate components and features of such systems.

Flow control—directing or regulating the movement, processing and disposition of locally generated or locally

processed solid waste materials—is a rational, responsible and realistic mechanism to implement comprehensive integrated municipal solid waste management policy.

Flow control does not necessarily displace or otherwise threaten private solid waste management service contractors. It merely assures that they will achieve success by advancing the public interest. Flow control enables local government to deal with as many pieces of the municipal solid waste management puzzle as possible—simultaneously, openly, harmoniously, responsibly.

ARGUMENT

I. MANDATORY DISPOSAL OF LOCALLY GENERATED SOLID WASTES AND RECYCLING RESIDUES AT GOVERNMENT-SPONSORED FACILITIES SERVES AND EFFECTUATES LEGITIMATE LOCAL INTERESTS.

A. Local Governments Have an Obligation To Protect Public Health and the Environment.

Local government management of municipal solid waste (or local government supervision of private performance of this activity) is a valid exercise of the police power. *See, e.g., California Reduction Co. v. Sanitary Reduction Works of San Francisco,* 199 U.S. 306 (1905); *Central Iowa Refuse Systems, Inc. v. Des Moines Metro. Solid Waste Agency,* 715 F.2d 419 (8th Cir. 1983) *cert. denied,* 471 U.S. 1003 (1985) ("Construction of solid waste disposal facilities is an essential government activity"). Indeed,

> control of local sanitation, including garbage collection and disposal, . . . is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment.

Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187, 1192 (6th Cir. 1981), *vacated and remanded on*

other grounds, 455 U.S. 931 (1982), *aff'd on remand,* 742 F.2d 949 (6th Cir. 1984), *cert. denied,* 471 U.S. 1004 (1985). Moreover, supervision of the removal and disposal of municipal solid waste is not only lawful but an affirmative duty properly delegated to and imposed on local government. McQuillin Mun Corp § 24.242 (3rd Ed).

Local authorities may supervise or directly perform the management of municipal solid waste generated within or imported into their service areas. Indeed, a municipal corporation can contract with one or more individuals or firms for the collection and removal of solid wastes, and it may grant an exclusive contract for such services, regulating the manner and mode of the contractor's operation. *Id.* at §§ 24.255, 24.248, 24.251.

B. Flow Control Protects Public Health and the Environment and Preserves Resources.

Flow control permits local authorities to assure that wastes, recyclables, compostables and other elements of the jurisdiction's solid waste stream will be processed or handled in an environmentally responsible manner.

Flow control of waste, when part of a properly designed and fully integrated solid waste management system, enables various segments of the municipal solid waste stream to reach the proper facility for processing, treatment or disposal. Reliable collection, processing and treatment systems improve the safety and public health benefits of such systems. For example, flow control facilitates compliance with federally-required random inspections for hazardous materials in incoming loads at landfills. *See* 40 C.F.R. § 258.20. In a fully integrated system, all waste materials can be channeled through a single management point, thereby permitting the system to make the best decisions on how each segment of the solid waste stream should be managed—whether by recycling, composting, landfilling, or disposing at waste-to-

energy facilities. Unless materials can be directed to appropriate facilities, proper and cost-effective inspection, sorting and separating, and management of the waste stream cannot be accomplished.

Local governments and agencies that operate waste-to-energy facilities must monitor the municipal solid waste stream to minimize the risk that incoming waste loads will contain toxic or explosive materials. By controlling the flow of waste from the generator, this can be accomplished.

Flow control permits local government to implement environmentally sound solid waste management goals. Allowing government to "enter into and meet long- and short-term contracts for final disposal, which are typically on a put-or-pay basis" is a legitimate nonprotectionist purpose. *J. Filiberto Sanitation, Inc. v. New Jersey Dept. of Environmental Protection,* 857 F.2d 913, 920 (3d Cir. 1988).

C. Flow Control Assures Oversight and Continuity of Management and Care for Systems and Facilities.

Flow control permits local authorities to set a tipping fee for a municipal solid waste management system that reflects the true cost of integrated municipal solid waste management, including its long-term environmental costs, and thus furthers the orderly and deliberate development and financial security of all municipal solid waste management facilities. Flow control is important, and defensible, where state or local government determines that a public facility is in the long-term best interests of its citizens (i) to assure stability or the continuous availability of solid waste management facilities that adequately address public health and environmental concerns, and (ii) to assure that such facilities are available at reasonable cost. The former concern simply reflects the significant public interest in having adequate, on-going and reliable municipal solid waste management services—no less important than

for safe drinking water, sewage treatment and police and fire protection.

Local government reasonably may determine that these services can best be assured and managed when local government itself undertakes the services. Availability and reliability of such services should not depend upon its profitability or the viability of private service providers alone. When local governments and solid waste authorities provide management facilities for locally generated solid wastes, they are not seeking profits. Their job is to implement carefully considered state, regional or local municipal solid waste plans and to place the financial burden equitably upon those whose needs are meant to be served.

Local governments and solid waste authorities have not been categorically exempted under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") for their waste management activities. *See* 42 U.S.C. § 9601 (21). In particular, these governments and agencies may incur liability for transporting materials containing hazardous substances covered by CERCLA. Hazardous wastes may be present in loads that municipal garbage trucks may have picked up from local businesses or even from households. As a result, local authorities may be deemed "transporters" of hazardous wastes even where insignificant amounts of such substances were part of each load. *See, e.g., B.F. Goodrich Co. v. Murtha,* 958 F.2d 1192 (2d Cir. 1992). Moreover, local governments are potentially liable under Superfund as "arrangers for disposal" of municipal solid waste even when such materials are collected and transported by private haulers. *Transportation Leasing Co. v. California,* No. CV-89-7368-WMB (GHKx) (C.D. Cal. July 21, 1992). The Court had earlier found that the governments can be said to have "owned or possessed" residential and commercial solid waste transported by contractors and government-licensed haulers. *Id.,* slip op. at 21-27 (C.D. Cal. Sept. 24, 1991). If, as a matter of law, a public entity that simply oversees the process of local solid waste management (which may be performed entirely by the private sector) can be held fully liable under federal law for any adverse environmental consequences of the process, then such an entity is entitled to corresponding authority to control the process—from generation to final disposition.

II. THE TOWN'S FLOW CONTROL MEASURE IS EVENHANDED AND DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE EITHER DIRECTLY OR IN PURPOSE AND EFFECT.

In determining whether a governmental entity has overstepped its role in regulating interstate commerce, this Court has established a two-step inquiry. First, does the regulation overtly discriminate against interstate trade? *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978). Such regulations, deemed "basically protectionist measure[s]," are subject to a "virtual[] *per se* rule of invalidity. *Id.* at 624; *see also Hughes v. Oklahoma,* 441 U.S. 322 (1979). Second, if the restriction does not flatly discriminate against interstate trade, then the court will decide whether it regulates evenhandedly to effect a legitimate local public interest with only incidental effects on interstate commerce. *Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970). The regulation will be upheld unless the burden imposed on commerce is clearly excessive in relation to putative local benefits.

> If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142.

A. Local Law 9 Is Not a Protectionist Measure That Burdens Out-of-State Economic Interests.

Key to the determination of protectionism versus non-protectionism is the extent of discrimination against out-of-state commerce. The ultimate purpose of the legislation under attack "may not be accomplished by discriminating against articles of commerce coming from outside the state unless there is some reason, *apart from their origin,* to treat them differently." *Philadelphia v. New Jersey,* 437 U.S. at 626-627 (emphasis added). It follows, then, that the ultimate purpose of the Town law may not be accomplished by discriminating against out-of-state interests unless there is some reason, apart from their origin or location, to treat them differently. Where the ordinances regulate evenhandedly those in-state and out-of-state, then the *per se* rule does not apply and a balancing test must be applied. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 471-472 (1981).

The Town does not impose an economic burden on out-of-state interests. No out-of-state companies are deprived of the opportunity to do local solid waste handling. The only burden, which is shared locally and elsewhere, is the community's burden of adequate planning for the management of locally-generated waste.

Thus, local regulation of environmental protection must be distinguished from the line of cases considering mere economic regulation, *e.g., Pike v. Bruce Church, Inc.,* 397 U.S. 137 (1970) and *Hughes v. Oklahoma,* 441 U.S. 322 (1979). The Court itself recognized this distinction in *Pike* stating, "We are not, then, dealing here with 'state legislation in the field of safety where the propriety of local regulation has long been recognized' or with an Act designed to protect consumers in Arizona from contaminated or unfit goods." 397 U.S. at 143. *See also Raymond Motor Transportation, Inc. v. Rice,* 434 U.S. 429, 449 (1978) (Blackmun, J., concurring) ("[I]f safety justifications are not illusory, the Court will

not second-guess legislative judgment about their importance in comparison with related burdens on interstate commerce." The *Pike* test is adequate to judge state and local solid waste regulation. *Pike* allows courts to adequately give deference to the historic and well-recognized state interests and express federal policy for state actions.

By comparison, the *Hughes* test is inappropriate for analyzing local solid waste regulation. *Hughes* requires a state or locality to demonstrate that it has chosen the best, the wisest, the most carefully crafted, least restrictive alternative available of all possible options that may occur to litigants or judges later, at their leisure. No higher or more inappropriate test for the constitutionality of a state action could be devised. The Court should not sit as a super-legislature to review the wisdom of state or local legislative decisions that flow from the core of state sovereign concerns such as environmental protection enactments.[2]

This Court should not construe Local Law 9 as a form of economic protectionism. The law is part of an overall solid waste management plan that makes allowances for recycling. Although the economic vitality of the Town's privately operated waste disposal facility is a concern, the facility's primary purpose is to manage solid waste consistent with Town needs and with state objectives.

The law assures that the designated facility will process the waste generated within the Town. The requirement that all "acceptable waste" generated within the Town be delivered to the Town's facility is a burden that

---

[2] "These safety measures carry a strong presumption of validity when challenged in Court. If there are alternative ways of solving a problem, we do not sit to determine which of them is best suited to achieve a valid State objective. Policy decisions are for the state legislature, absent federal entry into the field." *Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520, 524 (1959). *See also South Caroline State Highway Dept. v. Barnwell Bros., Inc.,* 303 U.S. 177, 190 (1937).

falls equally upon in-state and out-of-state businesses and facilities. The law is indifferent to the origin of the businesses or the location of other disposal or processing facilities.

B. Pervasive and Historic State and Local Regulation of Solid Waste Should Be Treated Differently From Overt Economic Measures and Should Be Accorded a Presumption of Validity.

Congress has chosen state and local governments to combat the nonhazardous solid waste management problem in this country through solid waste management planning.[3]

---

[3] In the Resource Conservation and Recovery Act, Pub. L. No. 94-580, 90 Stat. 2795 (1976), 42 U.S.C. §§ 6901-6987. ("RCRA"), Congress expressly disclaimed any major federal regulatory role in nonhazardous solid waste management, and affirmatively and expressly encouraged state and regional planning to solve the difficult issues surrounding waste disposal.

Federal lawmakers recognized the problems that communities faced in dealing with solid waste management, including "intergovernmental" relationships:

> [T]he continuing concentration of our population in expanding metropolitan and other urban areas has presented these communities with serious financial, management, intergovernmental, and technical problems in the disposal of solid wastes resulting from the industrial, commercial, domestic, and other activities carried on in such areas[.]

42 U.S.C. § 6901(a)(3). Congress also found that, the collection and disposal of solid waste should continue to be primarily the function of state, regional, and local agencies, with the direct federal role limited to facilitating local planning through technical assistance. 42 U.S.C. § 6901(a)(4).

In Subtitle D of RCRA, 42 U.S.C. §§ 6941-49, Congress specifically encouraged states and regions within states to develop comprehensive waste management plans, "which are environmentally sound and which maximize the utilization of valuable resources including . . . materials which are recoverable from solid waste." 42 U.S.C. § 6941. Before receiving approval of a plan from the Environmental Protection Agency ("EPA") (which leads to federal financial assistance) state waste management plans must meet several criteria set forth in 42 U.S.C. § 6943. These criteria include "closing or upgrading" all open dumps in the state, *id.* at (a)(3), and require that localities be able to guarantee long term streams of waste to resource recovery facilities. *Id.* at (a)(5).

RCRA's legislative history establishes that Congress wanted states and localities to assume responsibility for disposal of their own solid waste in an environmentally sound manner. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 9-11, *reprinted in* 1976 U.S. Code Cong. & Admin. News 6238, 6247-49 ("House Report"). House Report at 32-36, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6270-73. *See also* House Report at 7, 88-93, 102-103, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 6244-45, 6323-29, 6337-39.

Flow control is a mechanism to implement environmentally sound municipal solid waste management goals, not to make money. Such ordinances are an integral part of the state and local plans to ensure safe and efficient management of municipal solid waste.

Proper analysis addresses the extent to which the Town law is designed to protect the local environment, health and safety—areas that have long been recognized by this Court and Congress as within the purview of states.

Unlike overt economic measures intended to benefit in-state businesses, local regulation of solid waste management is based on concerns for the protection of public health and the environment. The state, as sovereign, has a legitimate and historically recognized power to protect both. The Court has long recognized and accorded deference to the reserved sovereign powers of the states to protect, defend and conserve the physical environment of the state itself. *See, e.g., Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1906).

The interest of the state as sovereign to protect its environment is no less important today. This Court has recognized the "substantial state interest in promoting conservation of energy and other natural resources and easing solid waste disposal problems." *Minnesota v.*

Clover Leaf Creamery Co., 449 U.S. 471, 473 (1981); *Maine v. Taylor*, 477 U.S. 131 (1986). *See also Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 954 (1982) (The preservation and conservation of groundwater is "unquestionably legitimate and highly important"); *Breard v. Alexandria*, 341 U.S. 622, 640 (1951) ("When there is a reasonable basis for legislation to protect the social, as distinguished from economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of Louisiana.") This plenary power was not withdrawn by the Commerce Clause, but only circumscribed by considerations of our federal economic system. As this Court stated in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960):

> In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when, "conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country."

362 U.S. at 443-444.

Commerce Clause analysis of an exercise of local police powers should start from the recognition that a state has both an obligation and a right to act to protect its environment and its citizens. The Court has previously held that the states' exercise of police power in areas such as transportation safety, quarantines, and rivers and harbors are to be accorded great deference.[4] This deference

---

[4] "The regulation of highways is 'akin to quarantine measures, game laws, and similar local regulations of rivers, harbors, piers, and docks, with respect to which the State has exceptional scope for the exercise of its regulatory power, and which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.'" *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) quoting *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 783 (1945).

should be extended to state and local action in the area of municipal solid waste management based upon the important state interests involved, historically local duties and concerns, and (in this case) the continued acknowledgment by Congress in RCRA that state and local government action is the appropriate method for addressing the problems.

Dissenting in *Philadelphia v. New Jersey*, Chief Justice Rehnquist recognized that laws regulating the flow of solid waste should be viewed the same way as other health and safety measures:

> Even if the Court is correct in its characterization of New Jersey's concerns, I do not see why a state may ban the importation of items whose movement risks contagion, but cannot ban the importation of items which, although they may be transported into the state without undue hazard, will then simply pile up in an ever increasing danger to the public's health and safety. The Commerce Clause was not drawn with a view to having the validity of state laws turn on such pointless distinctions.

437 U.S. at 632-33.

Thus, a state law that truly addresses environmental, not economic concerns, should be judged against a more lenient standard.

The pervasive and historic state regulation of solid waste should be treated differently from economic measures and should be accorded a presumption of validity. Deferential review of public health legislation is common in other areas of constitutional analysis unless expressly protected personal or political liberties are at stake. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938).

The Court has traditionally manifested the presumption of validity through what it has termed "sensitive consideration" of the state's interest in comparison to the effects on commerce. "The purpose of the 'sensitive consideration' is to determine if the asserted safety justification, although rational, is merely a pretext for discrimination against interstate commerce." *Kassel v. Consolidated Freightways Corp. of Delaware,* 450 U.S. 662, 692 (1981) (Rehnquist, C.J., dissenting. If the sensitive consideration shows no pretext, the presumption will be overcome only when the benefits are "slight or problematical." *Bibb v. Navajo Freight Lines, Inc.,* 359 U.S. 520, 524 (1959).

A presumption of validity appropriately focuses the analysis on the important state or local interest and places the burden on the person challenging the action to show not only that interstate commerce is affected, but that it is needlessly obstructed. The Court expounded the correct standard for the review of a non-economic, police power action in *Maine v. Taylor*:

> As long as a State does not *needlessly* obstruct interstate trade to attempt to 'place itself in a position of *economic* isolation' it retains broad authortiy to protect the health and safety of its citizens and the integrity of its natural resources.

477 U.S. 131, 151, citing *Baldwin v. G.A.F. Seelig,* 294 U.S. 511 (1935) (emphasis added).

The presumption of validity should be even greater if there is an historic state interest involved. "[I]t also is true that the Court has been most reluctant to invalidate under the Commerce Clause 'state legislation in the field of safety where the propriety of local regulation has long been recognized.'" *Raymond,* 434 U.S. at 443, *citing Pike,* 397 U.S. at 143. The present case falls squarely within an area where the propriety of local police power

regulation has long been recognized.[5] As such, local efforts to control solid waste should be presumed valid and accorded great deference. Further, this deference should be more pronounced where Congress, having considered the matter of municipal solid waste management, has purposely left it to the states and local authorities. As discussed above, RCRA evinces a federal policy of state action and control in the area of solid waste regulation.

An analysis of the local nature of a police power action and Congress's acquiescence in state action has been a factor in analyses of state action under Constitutional provisions. For example, *Huron Portland Cement* presented both a Supremacy Clause and Commerce Clause challenge to the city of Detroit's air quality requirements as they affected ships docked at Detroit harbor. In upholding Detroit's regulation of ship boiler firing, the Court found that Congress had not preempted the field of air quality protection and, indeed, had left air quality protection in large measure to the states. "Congressional recognition that the problem of air pollution is peculiarly a matter of state and local concern is manifest in this legislation." *Huron Portland Cement,* 362 U.S. at 446. *Accord Parker v. Brown,* 317 U.S. 341, 362, 363 (1943).

This same consideration of Congress's determination to leave to state regulation areas that are historically of local interest should be included in a Commerce Clause analysis of the present case.[6] Such an approach recog-

---

[5] *See California Reduction Co. v. Sanitary Reduction Works of San Francisco,* 199 U.S. 306 (1905); *Gardner v. Michigan,* 199 U.S. 325 (1905) (Both cases upholding exclusive municipal franchises of solid waste disposal.)

[6] (Chief) Justice Rehnquist urged just such an approach in a dissent in *Hughes v. Oklahoma,* stating "given the primacy of the local interest here, in the absence of conflicting federal regulation I would require one challenging a state conservation law on Commerce Clause grounds to establish a far greater burden on interstate commerce than is shown in this case." 441 U.S. 343 fn. 7.

nizes that states do not act in a vacuum, but must take into account both federal action and inaction. In a matter of important state interest such as municipal solid waste regulation, this Court must give effect to Congress's decision in RCRA to not preempt, but rather to urge, comprehensive state solid waste planning of the kind undertaken by New York State and implemented by the Respondent. The articulated federal policy to foster state and local action regulating municipal solid waste management should be accorded great deference.

CONCLUSION

For these reasons, the Court should affirm the decision of the New York Supreme Court, Appellate Division, Second Department.

Respectfully submitted,

BARRY S. SHANOFF
Counsel of Record
KNOPF & BROWN
1050 Seventeenth Street, N.W.
Washington, D.C. 20036
(202) 785-8200
Counsel for Amici Curiae

(Additional counsel listed on inside cover)

Supreme Court, U.S.
FILED
AUG 20 1993
OFFICE OF THE CLERK

No. 92-1402

In The

Supreme Court of the United States

October Term, 1993

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC. AND ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ Of Certiorari to the Supreme Court, Appellate Division Second Department of the State of New York

BRIEF OF AMICI CURIAE TOWN OF SMITHTOWN, ONONDAGA COUNTY, BERGEN COUNTY AND SOMERSET COUNTY IN SUPPORT OF RESPONDENT

JOHN B. ZOLLO
Smithtown Town Attorney
P.O. Box 575
99 West Main Street
New York, N.Y. 11787
(516) 360-7570

THOMAS C. MILLER
Somerset County Counsel
Administration Bldg.
P.O. Box 3000
Somerville, N.J. 08876
(908) 685-0900

ELIZABETH E. RANDALL
Bergen County Counsel
Court Plaza South
21 Main Street
Hackensack, N.J. 07601
(201) 646-2565

W. CULLEN MACDONALD
Counsel of Record
RICHARD L. SIGAL
ERIC S. PETERSEN
ERIC J. SAPIR
JEANNE M. SINCLAIR
DAVID N. ABRAMOWITZ
HAWKINS, DELAFIELD & WOOD
67 Wall Street
New York, N.Y. 10005
(212) 820-9333

JON A. GERBER
Onondaga County Attorney
Department of Law
Civic Center
421 Montgomery Street
10th Floor
Syracuse, N. Y. 13202
(315) 435-2170

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

35 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

Interest of the *Amici Curiae* 1

I. Interest of Onondaga County..... 2

II. Interest of Smithtown 4

III. Interests of Bergen and Somerset Counties 5

IV. Common Solutions to Common Problems..... 8

Summary of Argument 12

Argument 15

I. Public health and safety concerns regarding removal and disposal of immediately dangerous waste within municipalities have long been served by local municipal monopolies. Such public health and safety monopolies survive constitutional scrutiny despite their anti-competitive effects..... 15

A. Municipal public health monopolization of waste disposal has long been constitutionally recognized by this Court. Disease avoidance is still necessary..... 17

B. Local governmental public health monopolies' receipt of financial benefits does not render them subject to Commerce Clause review 19

II. Private landfill precedents do not invalidate municipal waste municipalities 22

A. The market participant doctrine supports reaffirming the decisions in *California Reduction* and *Gardner* validating municipal waste monopolies 24

TABLE OF CONTENTS – Continued

Page

B. Immunization of municipal sewer monopolies under the Sherman Act supports Immunization under the Commerce Clause 27

Conclusion 28

TABLE OF AUTHORITIES

Page

TABLE OF CASES

B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992) 26

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905) ..... *passim*

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992) 14, 22, 23, 24

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 2, 14, 22, 23, 24

Community Communications Co. v. Boulder, 455 U.S. 40 (1982) 27

District of Columbia v. Brooke, 214 U.S. 138 (1909) 19

Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., 405 U.S. 707 (1972) 21

Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources, 112 S. Ct. 2019 (1992) 14, 22, 23, 24

Gardner v. Michigan, 199 U.S. 325 (1905) ..... *passim*

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 25

Hutcheson v. City of Valdosta, 227 U.S. 303 (1913) 19

Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied* 471 U.S. 1004 (1985) 14, 18, 19

Hybud Equipment Corp. v. City of Akron, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985) 28

TABLE OF AUTHORITIES – Continued

Page

J. Filiberto Sanitation v. Department of Environmental Protection, 857 F.2d 913 (3d Cir. 1988) 26

Morgan's Steamship Co. v. Louisiana Bd. of Health, 118 U.S. 455 (1886) 19

Olsen v. Smith, 195 U.S. 322 (1904) 28

Ouachita Packet Co. v. Aiken, 121 U.S. 444 (1887) ..19, 21

Packet Co. v. Catlettsburg, 105 U.S. 559 (1881) 19, 21

Parker v. Brown, 317 U.S. 341 (1943) 28

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 21

Reeves, Inc. v. Stake, 447 U.S. 429 (1980) 25

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) ... 19, 20

Swin Resources Systems, Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990) 26

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 27

Transportation Co. v. Parkersburg, 107 U.S. 691 (1882) 19

White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) 25

Wyoming v. Oklahoma, 112 S. Ct. 789 (1992) 25

TABLE OF AUTHORITIES – Continued

Page

TABLE OF STATUTES

Federal

42 U.S.C.A. § 6901(a)(4) 14

State

McKinney's 1991 Laws of New York ch. 569 28

N.J. Stat. Ann. § 13:1E-1 *et. seq.* 6

N.J. Stat. Ann. § 13:1E-23 6

N.J. Stat. Ann. § 48:13A 10

N.J. Stat. Ann. § 48:13A-4 6

N.J. Stat. Ann. § 48:13A-5 6

N.J. Admin. Code § 7:26-6.2 6

N.J. Admin. Code § 7:26-6.5(b) 7

N.J. Admin. Code § 7:26-6.5(s) 7

N.J. Envtl. Conser. Law § 27-0704 8

N.Y. Gen. Mun. Law § 110-bb 4

N.Y. Pub. Auth. Law § 2045-a *et seq.* 2

Local

Smithtown Code § 177-17 (1991) 5

Village of Baldwinsville Local Law No. 4 (1993) 3

No. 92-1402

In The

Supreme Court of the United States

October Term, 1993

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC. AND ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ Of Certiorari to the Supreme Court, Appellate Division Second Department of the State of New York

BRIEF OF AMICI CURIAE TOWN OF SMITHTOWN, ONONDAGA COUNTY, BERGEN COUNTY AND SOMERSET COUNTY IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Onondaga County, New York and the Town of Smithtown, New York, and the Counties of Bergen and Somerset, New Jersey share an important bond – all have been entrusted with the responsibility of safely, environmentally soundly, economically and efficiently managing the long-term collection and disposal of solid waste generated within their borders. Although the *amici* have fulfilled their responsibilities through different disposal means, means molded by the numerous factors which

influence the solid waste management planning process, flow control mechanisms are fundamental to each *amici's* success.

The safe and proper disposal of garbage and the prevention of groundwater contamination, disease, obnoxious odors and dangerous gases and vermin inherent in solid waste is first and foremost a matter of public health and safety. Waste spreads "disease, pestilence, and death". (*Philadelphia v. New Jersey*, 437 U.S. 617, 631 (1978)). Solid waste collection, hauling and disposal is both a public service as essential as police and fire protection and a public utility as fundamental as sewage disposal and water supply. Waste is not a benign commodity. Waste haulage is not a conventional business enterprise.

I. Interest of Onondaga County

Onondaga County has the basic, operating responsibility to safely manage the garbage generated by the 470,000 citizens within its 794 square miles including the City of Syracuse with which it has a Memorandum of Understanding. The County has adopted an integrated solid waste management program (the "Program") for the disposal of over 300,000 tons of garbage and 100,000 tons of recyclables now being generated in the County, using the Onondaga County Resource Recovery Agency ("OCRRA") as its agent.

OCRRA is a public benefit corporation, duly created and existing pursuant to Title 13-B, § 2045-A of Article 8 of the Public Authorities Law (the "Act"). The County entered into a solid waste "Program Contract" with

OCRRA pursuant to which OCRRA is responsible for establishing a solid waste management system for the use of those municipalities within the County that choose to participate. The responsibilities of OCRRA include the financing, planning, development, acquisition and construction of a waste-to-energy facility, the acquisition or development of an environmentally secure double-lined landfill or other landfill disposal alternatives, the administration and enforcement of recycling laws and the implementation of a program for separating household hazardous waste.

OCRRA is authorized to contract with any municipality located within the County for the receipt and processing of all solid waste generated within the municipality. OCRRA has contracted with 33 of the 35 municipalities located within Onondaga County. Each municipality has voluntarily agreed to direct all waste generated within the municipality to the OCRRA designated facility and OCRRA has agreed to provide disposal service for such waste. Each of the participating municipalities has enacted a flow control ordinance which requires all haulers to deliver all waste generated within the respective municipalities to the OCRRA designated facility. For exampie, in Baldwinsville the hauler must "deliver all of the Solid Waste it collects within the Village to the Onondaga County Resource Recovery Agency System or as directed by the Agency." (Village of Baldwinsville Local Law No. 4 (1993)). The New York State legislature has authorized both the County and its municipalities to require "that all solid waste generated or

originating within their respective boundaries" be delivered "to a specified solid waste management resource recovery facility." (The Act § 2045-t).

OCRRA has contracted with a private company to build and operate a waste-to-energy facility which will provide disposal capacity for all waste generated by the 33 Onondaga municipalities. OCRRA issued over $178,000,000 in bonds to finance the facility which is now under construction. The contract with the private company requires OCRRA to deliver all waste generated by the 33 participating municipalities to the facility during the 25-year term of the agreement. OCRRA has procured landfill disposal rights in an out-of-state, fully permitted, double-lined landfill until the waste-to-energy facility is operational. In its procurement for such landfill capacity, OCRRA selected not the least expensive proposal, but the most environmentally sound, state-of-the-art landfill at the most reasonable price. The haulers for the participating municipalities are directed to deliver all waste to two OCRRA-operated transfer stations for compacting prior to shipment.

Interest of Smithtown

Smithtown is located in Suffolk County on Long Island and encompasses an area of approximately 53.3 square miles. It expects that 92,000 tons of garbage will be generated by its 120,000 residents during 1993. New York State authorized Smithtown to adopt local laws requiring that all waste within its boundaries be delivered to specified facilities. (N.Y. Gen. Mun. Law § 110-bb (McKinney

Supp. 1993). It adopted a flow control ordinance requiring that all waste be "delivered to" a specific solid waste management facility. (Smithtown Code § 177-17 (1991)).

Smithtown developed a comprehensive solid waste management plan, the centerpiece of which is a $176,000,000 waste-to-energy disposal facility sized for all waste generated within both Smithtown and the adjacent Town of Huntington. It was financed with bonds issued by the New York State Environmental Facilities Corporation. The Town of Huntington signed a put-or-pay service agreement, under which Huntington is obligated to deliver a minimum of 140,000 tons per year or pay damages for the unexcused non-delivery of waste equal to the revenues which would have been received from the sale of energy generated from the processing of the undelivered tonnages. Under an intermunicipal agreement with Huntington, Smithtown has subscribed to a portion of this put-or-pay obligation.

Interests of Bergen and Somerset Counties

Bergen County is located in northern New Jersey and borders Rockland County, New York. Bergen County contains 70 municipalities in which 825,380 people reside. Each year over 1,000,000 tons of solid waste are generated within the borders of the County. Somerset County is located in the northern center of the State. Somerset is 305 square miles and has a population of 243,743. It is projected that approximately 165,000 tons of non-recycled solid waste will be generated in the County in 1993.

Bergen and Somerset Counties are responsible for the long-term management of solid waste generated within

their respective borders. (New Jersey Solid Waste Management Act, N.J. Stat. Ann. 13:1E-1 *et seq.*). Their solid waste management plans are based upon and accompanied by a report containing (1) an inventory of the sources, composition and quantity of waste generated within the district; (2) projections of the amounts and composition of solid waste to be generated within the district in each of the 10 years following the year in which the report is prepared; (3) an inventory and appraisal, including the identity, location and life expectancy, of all solid waste facilities within the solid waste management district; and (4) an analysis of existing solid waste collection. (*Id.* 13:1E-21).

Each solid waste management plan contains the County's disposal strategy. Such plans are only adopted following public hearings. (*Id.* § 13:1E-23). Once adopted, the plan must be submitted for the approval of the Commissioner of the Department of Environmental Protection and Energy (the "DEPE"). The DEPE and the Board of Regulatory Commissioners have adopted rules, regulations and administrative orders providing for the interdistrict, intradistrict and interstate flow of solid waste. (*Id.* § 48:13A-4). These rules, regulations and administrative orders set forth the designations of specific waste flows, designating specific facilities to serve specific geographic areas. (N.J. Admin. Code § 7:26-6.2). Additionally, the Board of Regulatory Commissioners has the power to award a franchise to any person of good character engaged in solid waste disposal at rates and charges published in tariffs or contracts accepted by the DEPE. (N.J. Stat. Ann. § 48:13A-5).

Through intensive recycling efforts by Bergen County and the 70 Bergen municipalities, the County has managed to recycle approximately 55% of its total waste stream. Even after such exhaustive recycling, Bergen generates 540,000 tons of waste per year which require disposal. Waste generated in Bergen is delivered to transfer stations where it is compacted for long-haul to either the Essex County waste-to-energy facility or to a state of the art out-of-state privately owned and operated landfill. Bergen, through the Bergen County Utilities Authority (the "BCUA"), has entered into an interdistrict agreement with the Union County Utilities Authority for the long-term disposal of approximately 36% of the waste which remains post-recycling.

The Somerset County solid waste management plan requires that all non-recycled solid waste generated in Somerset County be delivered to two designated transfer stations for compacting and shipment to the Warren County waste-to-energy plant and to a privately owned and operated out-of-state landfill. Under the agreement with the Warren County Pollution Control Finance Authority, Somerset is obligated to deliver a minimum of 1,400 tons per week to the facility. The contract with the out of state landfill requires Somerset to deliver 200 tons per day to that facility.

The State has approved the Bergen and Somerset solid waste management plans and has adopted regulations which ratify the intradistrict, interdistrict and interstate waste flows set forth in the Bergen and Somerset plans. (N.J. Admin. Code § 7:26-6.5(b), (s)).

The New Jersey flow control mechanisms provided by solid waste management plans, state regulatory orders and the issuance of solid waste disposal franchises, when applicable, serve the same public health and financing functions as the ordinances adopted by Clarkstown.

Common Solutions to Common Problems

The *amici* have historically relied upon inexpensive local landfill capacity for disposal of waste generated within their borders. Each, however, has been forced to find alternative disposal solutions. To protect aquifers, New York State required all landfills on Long Island, including Smithtown's and Huntington's, to close by the end of 1990. (N.Y. Envtl. Conserv. Law § 27-0704). Upstate, many municipal landfills in Onondaga County were closed and tagged as state Superfund sites while others could not meet stringent new environmental regulations. In New Jersey, local landfills had filled to capacity.

Due to the inexpensive capital and operating costs associated with the mostly unlined local landfills and their proximity to the locally generated waste, there was little need by local government to implement legal flow control mechanisms. Haulers, who traditionally have not had to consider environmental responsibility, brought waste to the local landfill because it was the least expensive means to dispose of the waste. Today local governments require local flow control to carry out larger public purposes.

New York and New Jersey local governments, under explicit State authority, effectively monopolize all aspects

of basic public services similar to solid waste collection and disposal, such as police and fire protection and sewage disposal and water supply. Sewage disposal and waste disposal are similar. Sewage disposal is ordinarily provided homeowners by backyard septic systems or by sewer lines carrying sewage to a central municipal treatment facility. Homeowners and businesses are routinely obligated to cease using septic tanks, hook up to sewer lines provided by local government on a monopoly basis, and to pay all attendant costs. New Jersey and New York septic tank pumpers are not permitted to disregard sewer line hook-up ordinances, evade the public monopoly sewer system and truck the septic pumpings in interstate commerce. Nor may garbage haulers, the "pipeline" for solid waste, evade governmentally imposed disposal monopolies to truck waste across state borders.

New York and New Jersey empower local government to directly monopolize solid waste. More precisely, throughout both states, municipal employees and assets are regularly utilized to provide collection and disposal services for garbage generated within some neighborhoods. New Jersey and New York local governments have also created such monopolies through privatization as well as by the direct use of municipal labor forces. Waste collection and hauling service is often provided on an exclusive basis in a particular area by a private company selected through competitive bidding.

Currently approximately 30% of the waste generated in Onondaga County is collected by municipal haulers or municipally contracted haulers with exclusive rights to service specific service areas. Forty-five percent of the

waste generated in Smithtown is collected by Town contracted haulers with exclusive rights to service specific service areas. Sixty-three of the 70 Bergen municipalities collect waste through municipal employees or municipally contracted haulers and 15% of residential waste generated in Somerset County is collected by municipal or municipally contracted haulers.

Local governments cannot compete for waste in the marketplace. Local governments, unlike private carters, are required by state and federal mandates to achieve high recycling goals, to prevent the unlawful disposal of hazardous waste, to remove household hazardous waste from the waste stream and to dispose of solid waste in an environmentally sound manner. The costs of implementing measures to achieve these objectives are included, by necessity, in whole or in part in the per ton cost of disposal or "tipping fee" charged to haulers at the local governmentally sponsored disposal facility. (*See* N.J. Stat. Ann. § 48:13A). Private disposal facilities are not saddled with the full burden of these sound public policy objectives; their tipping fees do not freely reflect such costs. Flow control mechanisms are necessary to carry out and fulfill these public policy objectives and requirements.

Municipal governments require control over waste disposal as potentially responsible parties under CERCLA. Despite vigorous public education efforts trash may contain household hazardous waste which can expose local government to joint and several liability when disposed of in Superfund or other dangerous sites. Such "arranger" liability under CERCLA may attach regardless of how the waste was collected – municipally,

franchise or contract hauler, or unregulated private haulage. As a result the *amici* have chosen to sponsor their own facilities and disposal arrangements in order to minimize and control such risk.

After making the decision to construct a waste-to-energy facility, local governments must properly size their facilities and must insure a steady flow of waste so that when constructed the facilities will operate efficiently and in an environmentally correct manner. Proper combustion of the waste requires that the combustion chamber maintain a constant temperature; fluctuations in waste flows due to the inability to direct waste to the facility may well cause fluctuations in temperatures in the combustion chamber resulting in inefficient and environmentally unsound operations. If a waste-to-energy facility is undersized, the municipality will have defeated its purpose of developing a long-term waste disposal strategy for all of the garbage generated within its jurisdiction for which it had disposal responsibility. Flow control laws are fundamental tools necessary to plan adequately sized waste-to-energy facilities.

Bergen and Somerset Counties have heeded New Jersey's call for "regionalization". Bergen has contracted with Essex and Union Counties for capacity at their waste-to-energy facilities and Somerset has contracted for capacity at the Warren County waste-to-energy facilities. In addition to each county's interdistrict arrangement, Bergen and Somerset have been able to procure reasonable pricing for disposal of their remaining waste at state-of-the-art out of state landfills. Absent the flow control mechanism provided by New Jersey's comprehensive scheme, neither County would be able to commit to

delivering minimum amounts of waste to these environmentally sound facilities.

SUMMARY OF ARGUMENT

Petitioners equate a State effort to conserve or hoard remaining landfill capacity with municipal efforts to collect and dispose of all local solid waste in a safe and responsible manner. They argue that this Court should reject a municipal government's attempt to address local public health and safety concerns by use of local municipal waste monopolies because a result of such an attempt might be exclusion of private haulers. The argument continues that the required use of municipal facilities can never be sustained because such monopolistic use might occasionally or permanently result in public charges in excess of those for private transportation to out-of-state landfills. Even though it is the local residents and not the private hauler who bear the burden of such higher charges, coerced aggregation in collection and disposal is still argued to be unconstitutional because it interferes with a hauler's paramount Commerce Clause right to maximize its profits from such waste removal payments.

The *amici* respectfully suggest that Clarkstown be afforded unrestricted freedom in choosing the means to properly fulfill its public health and safety duties, whether it completely prohibits others from participating in the collecting and disposing of waste or whether it requires that private parties involved in the waste disposal process collect, handle, transport and deposit waste in only approved ways, including, most vitally, disposal

at only pre-approved locations. The most relevant prior decisions of this Court upholding public health and safety monopolies for the collection and disposal of waste accorded great respect for the public health and safety decisions of state and local governments in lawfully establishing and structuring such sanitation monopolies. (*See California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905); *Gardner v. Michigan*, 199 U.S. 325 (1905)).

> We perceive no ground to doubt the good faith of the Board of Supervisors; nor can we say that the mode adopted for the suppression of the evils in question was arbitrary or did not have a real, substantial relation to the protection of the public health.
>
> . . . .
>
> The State, charged with the duty of safeguarding the health of its people, committed the subject to the wisdom and discretion of the Board of Supervisors. The conclusion it reached appears in the ordinances in question, and the courts must accept it, unless these ordinances are, in some essential particular, repugnant to the fundamental law. (*California Reduction*, 119 U.S. at 320-21).

Numerous localities have long modeled their own safe waste disposal solutions upon the San Francisco and Detroit municipal monopolies which were approved by this Court in those cases.

> Courts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating and restraining competition among private collectors. *If any area of the law*

> *can be said to be well settled, this one is.* (*Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1192 (6th Cir. 1981); emphasis added).

Nothing in either the pre-existing or subsequent dormant Commerce Clause line of cases suggests that such municipal public health and safety monopolies are no longer valid alternatives available to local governments. Indeed, decisions before and after 1905 involving analogous direct governmental participation have been upheld under the dormant Commerce Clause.

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992), *Fort Gratiot Sanitary Landfill v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992); and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), hold only that neither the responsible state nor local government can prohibit or restrict the disposal at privately owned landfills of waste generated out of its jurisdiction without prohibition of local waste as well. Nowhere in any of these decisions is it seriously suggested that commercial designs of an excluded hauler would ever justify invalidating a public health requirement that all solid waste be disposed of at a local facility sized to dispose of all waste generated or found within the locale.

Congress has expressly recognized that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies." (Resource Conservation and Recovery Act of 1976, § 1002(a)(4), 42 U.S.C. § 6901(a)(4) (West 1983)). The *amici* urge this Court to continue to so entrust at least this much of the problem of waste disposal to those local governments "primarily" responsible for and actually participating in the collection and disposal of such waste.

Anything less invites the burdens and delays of review by injunction of every such local monopolizing governmental decision.

To now review the ever-changing decisions of each local government struggling to be responsive to Congress, their states, one another and their citizens is to impose further difficulties on their already difficult waste disposal task. The *amici* respectfully suggest that this Court avoid the need for every locality to specially justify its decision to aggregate or monopolize the collection or disposal of its waste in some "rule of reason" balancing inquiry by expressly declining to extend dormant Commerce Clause balancing, at least where it is shown that a locale's "flow control" law is augmenting its own direct participation in the collection and disposal of local waste. Our system of government requires this much respect for the local public health and safety waste collection decisions of voters through the duly enacted laws of their local governments.

ARGUMENT

I. PUBLIC HEALTH AND SAFETY CONCERNS REGARDING REMOVAL AND DISPOSAL OF IMMEDIATELY DANGEROUS WASTE WITHIN MUNICIPALITIES HAVE LONG BEEN SERVED BY LOCAL MUNICIPAL MONOPOLIES. SUCH PUBLIC HEALTH AND SAFETY MONOPOLIES SURVIVE CONSTITUTIONAL SCRUTINY DESPITE THEIR ANTI-COMPETITIVE EFFECTS.

Petitioners argue that they have a right to compete with Clarkstown for waste generated both within and

without Clarkstown because the Commerce Clause abhors "economic protectionism." They argue that local government must directly compete with private industry in the rendering of public health services as essential as the timely collection and disposal of municipal waste. No municipality can ever be permitted to decide to provide such services with respect to *all* waste within its borders, petitioners continue, unless the decision is justified by *pure* public health reasons, untainted by the specific economic goal or benefit of reducing the overall cost to the host municipality and its taxpayers.

What petitioners fail to recognize is the compelling interest of municipalities to adequately size municipal collection and disposal systems so as to be capable of handling *all* waste and how this interest cannot be served in an openly competitive market. For example, should spot market prices exceed those of the municipality, undersized municipal systems would become unable to dispose of waste that is *not* being collected and disposed of by private carters who always remain free to withdraw from the market. This leaves unplanned-for waste to the municipality whenever the cost of privately collecting and disposing rises to such a point that too few private carters remain willing to continue providing competitive services, regardless of whether the municipal system is capable of handling such abandoned waste. If a municipality sized its collection and disposal system so as to be capable of handling 100% of all waste that could reasonably be predicted to require collection and disposal, mandated competition would soon render uneconomic such oversized facilities and thereby inflict real economic

harms upon the municipality. This Court has never suggested in any way that a municipality cannot avoid such harms by a decision to compel collection and disposal of *all* waste within its borders at a charge which applies uniformly to all waste possessors no matter where the waste was generated.

A. Municipal public health monopolization of waste disposal has long been constitutionally recognized by this Court. Disease avoidance is still necessary.

Historically, courts have recognized public health monopolies as necessary for municipalities to attract private capital to participate on its behalf in the provision of such an essential public service as the collection and disposal of municipal solid waste. In *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) and *Gardner v. Michigan*, 199 U.S. 325 (1905), this Court rejected private haulers' "due process" and "takings" claims and upheld injunctions enforcing municipal awards of exclusive collection and disposal monopolies because:

> [T]he municipal authorities might well have doubted whether the substances that were *per se* dangerous or worthless would be separated from such as could be utilized and whether the former would be deposited by the scavenger at some place that would not endanger the public health. They might well have thought that the safety of the community could not be assured unless the entire mass of garbage and refuse, constituting the nuisance, from which the danger came, was carried to a crematory where it

> could be promptly destroyed by fire; and thus minimize the danger to the public health. (*California Reduction*, 199 U.S. at 323).

Both *California Reduction* and *Gardner* remain as compelling and persuasive as ever. Recently *Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187 (6th Cir. 1981) rejected efforts to distinguish *California Reduction* and *Gardner*, efforts which are identical to petitioner's:

> They argue that Akron's purpose in acquiring a monopoly over garbage is not public health, as was the purpose in the old cases, but rather making its energy plant more profitable by insulating it from competition for raw materials. A monopoly imposed for that purpose, they argue, is neither necessary nor efficient.
>
> *The old cases are not anachronisms. They are not distinguishable on any of these grounds. The solid waste disposal problem is as serious today for cities as in the past, perhaps more serious.*
>
> . . . .
>
> Neither does the fact that the City appropriates the value and sells some of the recyclable waste, or chooses in manufacturing energy to burn some of the paper and cardboard rather than to resell it, distinguish the old cases. *Under these cases, the City could simply have taken over all garbage collection as in San Francisco, Detroit and Cincinnati, depriving existing collectors of any business at all.*
>
> . . . .
>
> *In each of the cases discussed above the city granted a monopoly right to collect garbage to a single company, permitting that company alone to engage in a profitable business that had previously*

> *been done by several firms*. The courts held that the public interest in regulation of garbage was so great that monopolization of the service and the attendant transfer of profits did not violate the taking or due process clause. (*Hybud*, 654 F.2d at 1193-94; emphasis added).

Adherence to these municipal waste precedents is still necessary for public health and safety reasons. Such dangers persist. Prevention of disease is and will always be the core reason for the results in *California Reduction* and *Gardner*.

B. Local governmental public health monopolies' receipt of financial benefits does not render them subject to Commerce Clause review.

Municipalities have long used local governmental monopolies to attract private capital for public ends. Much of our infrastructure was originally built and operated through such municipal monopoly grants. The constitutionality of such monopolies have been repeatedly challenged by both competitors and paying customers. (*E.g., Hutcheson v. City of Valdosta*, 227 U.S. 303 (1913); *District of Columbia v. Brooke*, 214 U.S. 138 (1909); *Ouachita Packet Co. v. Aiken*, 121 U.S. 444 (1887); *Morgan's Steamship Co. v. Louisiana Bd. of Health*, 118 U.S. 455 (1886); *Transportation Co. v. Parkersburg*, 107 U.S. 691 (1882); *Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872)). None of the wide-ranging full-scale constitutional assaults on the anti-competitive effects of such municipally established monopolies ever succeeded in overcoming a public health and safety justification.

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community."

. . . .

In *Gibbons v. Ogden*, Chief Justice Marshall, speaking of inspection laws passed by the States, says: "They form a portion of that immense mass of legislation which controls everything within the territory of a State not surrendered to the General Government – all of which can be most advantageously administered by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, &c., are component parts. No direct general power over these objects is granted to Congress; and consequently they remain subject to State legislation." (*Slaughter-House Cases*, 83 U.S. (16 Wall.) at 62-63 (citations omitted)).

No such monopoly case ever held that indisputably strong public health and safety legislative purposes are to yield to less detrimental impacts upon interstate commerce. "Balancing" should not be necessary when dealing with the public health and safety, i.e. "We are not, then, dealing here with state legislation in the field of *safety*

where the propriety of local regulation has long been recognized'." (*Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143 (1970)).

These same decisions have repeatedly held that federal courts should not interfere with local public health and safety monopolies in "works and improvements of a local character."

> In all such cases of local concern, though incidentally affecting commerce, we have held that the courts of the United States cannot, as such, interfere with the regulations made by the State, nor sit in judgment on the charges imposed for the use of improvements or facilities afforded, or for the services rendered under state authority. It is for Congress alone, under its power to regulate commerce with foreign nations and among the several states, to correct any abuses that may arise, or to assume to itself the regulation of the subject. (*Ouachita Packet Co. v. Aiken*, 121 U.S. 444, 447-48 (1887)).

The financing of these local public health and safety solutions necessitated and justified their monopolizing features. For example, in *Packet Co. v. Catlettsburg*, the requirement that Ohio river steamers exclusively use the town wharf instead of the river bank within its borders, withstood constitutional scrutiny and was upheld as a coercive municipal monopoly permissible under the Commerce Clause. (*Packet Co. v. Catlettsburg*, 105 U.S. 559 (1881)). More recently, in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), this Court recognized a municipality's financing needs and upheld local airport charges on users of a municipal airport.

> We therefore regard it as settled that a charge designed only to make the user of state-provided facilities pay a reasonable fee to help defray the costs of their construction and maintenance may constitutionally be imposed upon interstate and domestic users alike. (*Id.* at 714).

Because many local governments have long relied on these established Commerce Clause principles in forming monopolies, including municipal waste monopolies, and because public health and safety concerns in the area of solid waste collection and disposal are as compelling today as they have ever been, the *amici* respectively suggest that this Court apply such precedent to uphold Clarkstown's municipal waste monopoly.

II. PRIVATE LANDFILL PRECEDENTS DO NOT INVALIDATE MUNICIPAL WASTE MONOPOLIES.

This Court's decisions striking down landfill conservation laws which attempted to exclude out-of-state waste do not lessen the traditional respect for public health and financing justifications for "flow control" laws. The conservation principles on which those decisions were based would be unaffected by this Court's continued approval of municipal collection and disposal monopolies.

Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992), *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 112 S. Ct. 2019 (1992) and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), each invalidated discriminatory laws which restricted access

to privately owned landfills. Such landfills had previously accepted waste from local as well as out-of-state waste generators, but were prevented from receiving out-of-state waste unless special permissions were obtained or special fees paid. In each instance, the restrictions had been adopted, not because of immediately threatening local public health concerns, but for long term conservation reasons. The cases had nothing to do with a decision by a local government, responsible for the collection and disposal of waste in its jurisdiction and actively engaged in protecting its citizens from imminent public health and safety threats, to aggregate and monopolize its collection and disposal services. In fact, each decision clearly suggested that had there been any such imminent public health or safety justification the opposite conclusion would have resulted. (*Fort Gratiot Sanitary Landfill*, 112 S. Ct. at 2027 ("Of course, *our conclusion would be different* if the imported waste raised health or other concerns not presented by Michigan waste." (emphasis added); *Philadelphia v. New Jersey*, 437 U.S. at 626, 629 ("There has been no claim here that the very movement of waste into or through New Jersey endangers health. . . . "); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. at 2015 ("There is absolutely no evidence before this Court that waste generated outside Alabama is more dangerous than waste generated in Alabama. . . . ")).

In the instant case, there were an abundance of genuine and compelling health and safety concerns being voiced at the public hearing leading to Clarkstown's decision to limit disposal to a single site. (J.A. at 34-68). Such evidence also supports the equally compelling implementation of that decision via a wholly non-discriminatory –

all wastes – monopolizing requirement. Thus, the *Philadelphia – Fort Gratiot – Chemical Waste* rejection of conservation as an acceptable discrimination rationale simply has little or nothing in common with Clarkstown's decision.

Although Clarkstown's plan does offer potential financial advantage through bulk purchases, nothing in these conservation decisions suggests that such possible financial benefits would ever invalidate legitimate public health and safety monopolies under the dormant Commerce Clause. Indeed, *Philadelphia v. New Jersey* and *Fort Gratiot Sanitary Landfill*, each expressly disclaimed any opinion as to the appropriateness of the municipalities' policies in even the conservation of their own facilities. (*Philadelphia v. New Jersey*, 437 U.S. at 627-628 n.6; *Fort Gratiot Sanitary Landfill*, 112 S. Ct. at 2023).

Thus, these cases simply hold that the burden of conserving disposal resources must not be borne solely by out-of-state interests. By attempting to do so, a benefit was transferred to in-state users, even though public funds or credit had not been used to support the privately owned landfill businesses.

A. The market participant doctrine supports reaffirming the decisions in *California Reduction* and *Gardner* validating municipal waste monopolies.

The market participant doctrine provides an independent basis for the *per se* validation of flow control laws enacted by a responsible local government where it is actively participating in the collection and disposal of

municipal waste through exclusivity or monopolistic controls having both public health and public finance benefits. (*Wyoming v. Oklahoma*, 112 S. Ct. 789 (1992); *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976)). The *amici* respectfully suggest that this rule comports with *California Reduction* and *Gardner* and this Court should expressly extend it to include municipal waste monopolies.

Investing time, effort and funds in a fundamental government operation like sanitary waste disposal clearly justifies the need for a state to have the option of excluding competition in order to conserve public funds through non-discriminatory user fees intended to pay for that investment. Such exclusivity choices have been repeatedly upheld in older monopoly cases for essentially the same "sovereignty" reasons as underlie this Court's recent market participation cases. Thus, if the State may restrain competition in interstate commerce when dispensing funds in areas not traditionally considered governmental functions, it would seem that more flexibility, not less, should be afforded it when committing funds in more traditional areas. (*White v. Massachusetts Council of Constr. Employers*, 460 U.S. at 214-215). Indeed, the type of monopoly at issue here has long been used to implement this most traditional municipal task.

As in *White*, the local government here has a clear financial participation in the relevant market. Under its five-year put-or-pay financing commitment, if sufficient waste is produced annually, no direct Clarkstown payments will be required; but if insufficient, Clarkstown must pay. This sort of financing guarantee constitutes

participation in most marketplaces. Indeed, such governmental assurances of performance are often necessary to induce lenders to loan moneys in order to construct facilities. Nothing in the market participation cases suggests that Clarkstown's monopoly, operating in conjunction with its disposal guarantee, would not fall within the rule expressed therein. In addition, Clarkstown's potential CERCLA liability should bring it within these prior marketplace decisions. (*B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992)).

For example, the court in *Swin Resources Systems, Inc. v. Lycoming County*, 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990), upheld a local county's market participant status in operating its landfill and thereby exempted it from the reach of the dormant Commerce Clause. And although there are some differences between a municipality's operation of a transfer station and a landfill, the more meaningful similarities would seem to control. And as a practical matter, aggregating the waste at the transfer station creates more financial latitude for Clarkstown in purchasing transportation and landfill services. Such advantages were noted as important factors by the court in *J. Filiberto Sanitation v. Department of Environmental Protection*, 857 F.2d 913 (3d Cir. 1988):

> The transfer station is the county's only disposal facility. As such it is irreplaceable. As a centralized depository, it is the basis of the county's ability to plan and execute long- and short-term disposal arrangements. As such, it is indispensable. (*Id.* at 922).

The *amici* respectfully submit that the basic rationale in this Court's market participation decisions wholly justifies its application to Clarkstown's participation in waste collection and disposal through its transfer station, its financially sustaining put-or-pay commitment and the chosen "flow control" means of fulfilling it.

B. Immunization of municipal sewer monopolies under the Sherman Act supports immunization under the Commerce Clause.

The similarity of the goals of the Sherman Act and dormant Commerce Clause jurisprudence suggests that this Court's *per se* immunization in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) of municipal public health and safety monopolies under the Sherman Act also supports, by analogy, a *per se* immunity result under the Commerce Clause. If a court should hesitate to uphold *per se* immunity under the Sherman Act for some government business monopolies not presenting genuine safety and health needs (see, e.g. *Community Communications Co. v. Boulder*, 455 U.S. 40 (1982)), it should be equally hesitant under the Commerce Clause; in both cases the need for a rule of reason type of balancing inquiry with all of its attendant transaction costs may be justified by the more detailed and comprehensive economic understandings potentially available.

New York State authorized Clarkstown to impose "appropriate and reasonable limitations" on "competition" by requiring "that *all* solid waste" no matter its origins "shall be delivered to a specified" facility. (Rockland County – Solid Waste Treatment and Disposal Act,

ch. 569, McKinney's 1991 Laws of New York 1072). Clarkstown's equitable ownership and exclusive use of the transfer station makes it a constitutionally valid "actor" within the meaning of the rationales behind sovereign immunity under the Sherman Act. (*Parker v. Brown*, 317 U.S. 341 (1943); *Olsen v. Smith*, 195 U.S. 332 (1904); *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949 (6th Cir. 1984)).

CONCLUSION

In areas of public health and safety, where national uniformity is simply untenable, the decisions of local governments should continue to be validated by the courts, even in the case of a municipally-imposed monopoly. (*Parker* v. *Brown*, 317 U.S. 341, 352 (1943)). Such federalism considerations demonstrate why petitioners' attempt to extend backwards three private landfill conservation decisions to local governments chiefly responsible for collecting and disposing of solid waste must be denied. Those decisions were premised on the need to resolve conflicting, yet equally valid, interests between disposing states and landfill-conserving states. Local monopolizing decisions being made and adjusted in response to the needs of local communities simply do not yield such conflicts.

The *amici* respectfully commend to this Court that it continue entrusting to the states their waste monopolizing decisions.

For these reasons, the decision below should be affirmed.

Respectfully Submitted,

W. Cullen MacDonald
Counsel of Record
Richard L. Sigal
Eric S. Petersen
Eric Sapir
Jeanne M. Sinclair
David N. Abramowitz
Hawkins, Delafield & Wood
67 Wall Street
New York, N.Y. 10005
(212) 820-9333

Jon A. Gerber
County Attorney
County of Onondaga
Department of Law
John H. Mulroy Civic Center
421 Montgomery Street
10th Floor
Syracuse, N.Y. 13202
(315) 435-2170

John B. Zollo
Town Attorney
Town of Smithtown
P.O. Box 575
99 West Main Street
New York, N.Y. 11787
(516) 360-7570

Thomas C. Miller
Somerset County Counsel
Somerset County
Administration Building
P.O. Box 3000
Somerville, N.J. 08876
(908) 685-0900

Elizabeth E. Randall
County Counsel
County of Bergen
Court Plaza South
21 Main Street
Hackensack, N.J. 07601
(201) 646-2565

FILED
AUG 23 1993
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1993

C & A Carbone, Inc.,
Recycling Products of Rockland, Inc.,
C & C Realty, Inc., and
Angelo Carbone,
Petitioners,

v.

Town of Clarkstown,
Respondent.

On Writ of Certiorari to the Supreme Court,
Appellate Division, Second Department
of the State of New York

BRIEF AMICUS CURIAE OF THE
[illegible] AUTHORITY
OF [illegible], HUNTSVILLE, ALABAMA
IN SUPPORT OF RESPONDENT

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]
Counsel for Amicus Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	5
ARGUMENT	6
I. PUBLIC SERVICE WASTE COLLECTION AND REMOVAL SYSTEMS ARE TRADITIONAL FUNCTIONS OF LOCAL GOVERNMENT, JUSTIFIED AS HARM PREVENTION MEASURES UNDER THE TRADITIONAL POLICE POWER OF THE STATES	6
II. CLARKSTOWN'S ORDINANCE IS SUBSTANTIALLY SIMILAR TO REGULATIONS ALREADY UPHELD BY THIS COURT AGAINST TAKINGS AND DUE PROCESS CHALLENGES	8
III. FOR THE PURPOSE OF ANALYSIS, THE MSW WASTE INDUSTRY MAY BE DIVIDED INTO DISCRETE SEGMENTS	9
IV. CARBONE'S RECYCLING OR RESOURCE RECOVERY OPERATION IS STRICTLY LOCAL AND DOES NOT IMPACT INTERSTATE COMMERCE	10
V. THE MOTIVES OF INDIVIDUAL MEMBERS OF LEGISLATIVE BODIES IN PASSING LAWS ARE NOT USEFUL EXTRINSIC AIDS TO CONSTRUCTION, AND ARE UNIFORMLY DISREGARDED FOR INTERPRETIVE PURPOSES	12
CONCLUSION	13
APPENDIX A	1a
APPENDIX B	37a

TABLE OF AUTHORITIES

CASES Page

Aldridge v. Williams, 3 How (44 U.S.) 9 (1845) 12
California Reduction Co. v. Sanitary Works, 199 U.S. 306 (1905) 8, 9, 13
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 6, 7, 9
Duplex Printing Co. v. Deering, 254 U.S. 443 (1921) 12
Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Nat. Res., 112 S.Ct. 2019 (1992), 119 L.Ed.2d 121, —— U.S. —— 7
Gardner v. Michigan, 199 U.S. 235 (1905) 8, 13
H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949) 7
Hipolite Egg Co. v. U.S., 220 U.S. 45 (1911) 11
Illinois General Elec. Co., 683 F.2d 206 (CA 1982), *cert. denied*, 461 U.S. 913 13
Waring v. Mobile, 8 Wall. (75 U.S.) 110 (1869) 11

STATUTES

Ala. Code § 11-89A-01 1

OTHER AUTHORITIES

U.S. Constitution, Amend. 5 & 14 8
McQuillin, Municipal Corporations, § 24.250 (3rd Ed.) 6
Sutherland Statutory Construction § 48.17 (4th Ed.) 12

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

No. 92-1402

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,
v.
TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

BRIEF *AMICUS CURIAE* OF THE SOLID WASTE DISPOSAL AUTHORITY OF THE CITY OF HUNTSVILLE, ALABAMA IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Solid Waste Disposal Authority of the City of Huntsville, located in Madison County, Alabama (hereinafter "the Authority"), is a public corporation of the State of Alabama organized pursuant to the Solid Waste Disposal Authority Act of the State, Code of Alabama, 1975, § 11-89A-01, et seq. The Authority provides waste disposal services under contract with the City of Huntsville, a municipal corporation within the State of Alabama (hereinafter the "City"), as an integral part of the City's solid waste collection and disposal system. Three

basic documents define the functions of the Authority. The documents are the City Solid Waste Ordinance establishing a comprehensive waste collection and disposal system within the City requiring mandatory delivery of all locally produced Municipal Solid Waste (MSW) to the system [1]; the City Delivery Agreement under which the City is required (until the year 2014) to deliver or cause to be delivered to the Authority all acceptable waste (acceptable waste excludes certain hazardous waste) generated or occurring on local premises within the City; and the Army Contract under which the U.S. Army (the "Army") is obligated (until the year 2014) to purchase steam from the Authority, to be used to heat and cool (by steam operated compressors) Redstone Arsenal Military Reservation, located adjacent to the City. The Authority receives revenue from the sale of steam under the Army Contract, from tipping fees paid by the City, and from tipping fees paid by City franchised or licensed haulers who are required by the Ordinance as a condition of their license or franchise, to deliver all acceptable waste to the Authority [2]. The Authority owns and operates a 695 ton per day Municipal Solid Waste (MSW) incinerator. The incinerator burns MSW, sewage sludge, and landfill gas to produce the steam which is delivered to the Army under the Army Contract. The Authority owns and operates an MSW ash monofill for the disposal of MSW combustor ash residue; an inert landfill for the disposal of inert waste such as tree limbs and construction debris;

---

[1] Comprehensive Waste Control or Management measures are frequently referenced to as "flow control" ordinances or regulations, particularly in connection with public financings of facilities. The concern in the financial markets is with the stream of revenue, whereas, such measures are frequently nothing more than comprehensive police power regulations of private premises, enacted pursuant to the harm prevention concern of local government under the traditional police power.

[2] The Solid Waste Ordinance of the City of Huntsville is included herein as Appendix A.

and a putrescible landfill for the disposal of any putrescible waste not burned in the incinerator or which is at any time in excess of incinerator capacity. The Authority also operates a voluntary curbside single family household recycling collection program which removes brown, green, clear, and blue glass; plastic soft drink bottles and milk jugs; aluminum and steel cans; newspapers and magazines; used motor oil; and dry cell household batteries, from the MSW wastestream, before it is removed from private premises by City haulers. The Authority operates a voluntary Household Hazardous Waste Collection Program under contract with the Madison County Health Department, targeted for removal of a portion of certain household hazardous material from the MSW wastestream. Included in the material sought to be separated from the MSW wastestream through the Household Hazardous Waste Program are paints and related products; pesticides, insecticides and herbicides; household cleaners and solvents; automotive batteries and petroleum products; acids; and pool and photographic chemicals. The Authority also operates a White Goods Recycling Program which removes appliances such as old refrigerators and stoves from the wastestream for scrap value. The Authority accepts all MSW generated by the publicly operated Madison County Collection System as well. Madison County also operates a voluntary recycling program, and participates with the local Health Department in the Household Hazardous Waste Program. It is fair to characterize the program resulting from the City-Authority agreement as a long term comprehensive MSW Wastestream Management Program serving the City of Huntsville and Madison County.

The City Solid Waste Ordinance is similar in all of its substantive terms to the Clarkstown Ordinance. Neither the Huntsville Ordinance or the Agreements mandate the disposal site of waste delivered to the System. The Authority is free, under the Ordinance and under the

Agreements, to dispose of waste at out of state disposal sites if it chooses.

In order to finance the acquisition and construction of its waste disposal system, the Authority has issued its Municipal Revenue Bonds. The face amount of Authority debt now outstanding from the issuance of bonds is $121,045,000. Certain excerpts from the Final Official Statement of the Authority used in connection with the sale of its 1990 Bonds are set out in Appendix B, and contain descriptions of the basic documents with respect to the Authority's Waste Disposal System. Not surprisingly, the term "Flow Control" is used to characterize the City's Solid Waste Ordinance, because that is the language of the financial market.

The Authority thus has a vital interest in the outcome of the present case. The availability of funds for the payment of its outstanding bonds depends upon its receipt of the proceeds from the sale of steam to the Army, and from the receipt of *all* tipping fees with respect to the operation by the City of its Waste Collection and Disposal System. The ability of the Authority to operate a comprehensively managed solid waste disposal system for the City of Huntsville, and to thereby protect the Public Health and the environment, as well as to reduce the City's contingent liability for cleanup of any contamination which might be released into the environment from waste handled through its system, wherever disposed or deposited,[3] depends upon the validity and enforceability under state and federal law of the wastestream security measure, the Solid Waste Ordinance. The City, by adoption of the Solid Waste Ordinance and the Agreements, has determined that a regulation which creates a managed wastestream and which displaces competition with monop-

[3] Deposited is the better word. Except for the term "Political Science," surely the term "Waste Disposal" has got to be the ultimate oxymoron, for indeed there is no "Disposal" in "Waste Disposal," just as there is no "Science" in "Political Science."

oly public service is necessary to prevent the occurrence of nuisances on private premises and to protect the public health and the environment.

SUMMARY OF ARGUMENT

There is no market in MSW waste residue in Clarkstown. Clarkstown has elected to address its legitimate regulatory concerns with respect to the sanitation of private premises in Clarkstown by establishing a comprehensive public waste collection and removal system. The fact that Clarkstown's Ordinance requires mandatory delivery of useless and noisome waste to the established system does not transform Clarkstown from a health and safety regulator into either a market participant or a market regulator. Clarkstown instead is nothing more than a police power regulator and public service provider. The thrust of Clarkstown's Ordinance and of its system is the regulation of premises in Clarkstown and the prevention of the nuisances and harm that might result from the failure to remove noisome waste from those premises. The mandatory delivery provisions of Clarkstown's Ordinance force the occupants and users of premises in Clarkstown to avoid the creation of nuisances upon such premises, and in effect to do nothing more than perform their common law duty not to cause harm to their neighbors or to the community. The potential risks from any indiscriminate disposal of waste occurring or being generated upon private premises in Clarkstown represents potential harm to the public health, public safety, and to the environment of Clarkstown (and elsewhere). The potential release into the general environment of noisome and hazardous material normally found in the MSW wastestream in Clarkstown and elsewhere is a legitimate concern of Clarkstown. Clarkstown, in the exercise of its legitimate legislative discretion, has elected to create a comprehensive waste collection and removal system. The useless waste residue resulting from the operation of Carbone's legitimate recycling business on its private premises in Clarkstown is

not different in kind from similar material generated upon the various other private premises in Clarkstown. The operation of Carbone's Recyclery is local, and the concern of Clarkstown with the efficient collection of the useless MSW waste residue is local.

A state or local police power regulation which is otherwise valid, creating a comprehensive collection and removal system as a means of addressing legitimate concerns for sanitation of local premises, should be considered strictly local, and should not be measured by this Court against the strictures of the Dormant Commerce Clause.

ARGUMENT

I. PUBLIC SERVICE WASTE COLLECTION AND REMOVAL SYSTEMS ARE TRADITIONAL FUNCTIONS OF LOCAL GOVERNMENT, JUSTIFIED AS HARM PREVENTION MEASURES UNDER THE TRADITIONAL POLICE POWER OF THE STATES.

"The gathering of garbage is not a trade, business, or occupation, but it is a public duty, to be performed by a city in a manner that will best promote the health of the inhabitants. Municipal corporations frequently perform the service of collecting and removing all garbage, trash, and similar substances, and prohibit any other persons from engaging in that business. . . . (A municipality) may provide that all scavenger work within it be done by a person appointed by it and prohibit anyone else from engaging in such work." *McQuillin, Municipal Corporations*, § 24.250 (3rd Ed.). The collection and removal of all noisome waste occurring or generated upon private premises is a traditional function of local government, justified under the harm prevention aspect of the police power. The harm sought to be prevented here and the legitimate local governmental concern of Clarkstown is the contamination of local premises in Clarkstown. In that respect this case is unlike *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), where the harm prevention claimed as a justification for the regulation arose ". . . after its disposal in landfill sites." *Id.* at 629. It was conceded by New Jersey that "there (was) no basis to distinguish out-of-state waste from domestic waste." *Id* at 629.

Mandatory participation in waste collection systems, such as is required by the Clarkstown Ordinance, is justified under the police power as nothing more than a requirement that each owner of premises meet his responsibility not to harm his neighbor or the public interest by creating and maintaining the nuisance which would necessarily result from his failure to carry out his or her common law duty of harm prevention.

This is not a case of Clarkstown using the guise of a police power regulation to advance its own commercial interest. There is no commercial market with respect to waste, such as the useless residue generated upon Carbone's premises, until Clarkstown places the consolidated waste removed from the various premises in Clarkstown into the market. As pointed out in *Fort Gratiot v. Michigan*, —— U.S. ——, 112 S. Ct. 2019, 2023 (1992):

> . . . the "negative" or "dormant" aspect of the Commerce Clause prohibits states from advanc[ing] their own COMMERCIAL INTEREST by curtailing the movement of articles of commerce, *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949) (emphasis added).

The first point at which Clarkstown's MSW waste becomes a part of any waste market is when it is carried from Clarkstown's transfer station to a disposal site.

PAGE

Laws of New York

L. 1976, c. 913 9
L. 1977, c. 425, § 6 8
L. 1979, c. 509 9
L. 1979, c. 510 9
L. 1980, c. 552, § 1 8
L. 1980, c. 552, § 1(a) 8
L. 1980, c. 552, § 1(b) 8
L. 1980, c. 552, § 1(b)(2) 8
L. 1980, c. 560 9
L. 1981, c. 932 9
L. 1982, c. 632 9
L. 1982, c. 675 9
L. 1983, c. 502 9
L. 1983, c. 513 9
L. 1983, c. 930 9
L. 1984, c. 638 9
L. 1985, c. 478 9
L. 1985, c. 670 9
L. 1985, c. 697 9
L. 1985, c. 797 9
L. 1986, c. 627 9
L. 1986, c. 840 9
L. 1986, c. 936 9
L. 1987, c. 71 9
L. 1987, c. 485 9
L. 1987, c. 747 9
L. 1987, c. 773 9
L. 1988, c. 70, § 2 12
L. 1988, c. 627 9
L. 1988, c. 665 9
L. 1988, c. 667 9
L. 1988, c. 670 9
L. 1989, c. 80 9
L. 1989, c. 726 9

PAGE

L. 1991, c. 369 10
L. 1991, c. 540 10
L. 1991, c. 569 ..... 9-10, 11
L. 1991, c. 631 10
L. 1992, c. 252 10
L. 1992, c. 350 10
L. 1992, c. 369 10
L. 1992, c. 391 10
L. 1992, c. 567 10
L. 1992, c. 629 10

Other States

Colo. Rev. Stat. § 30-20-107 11

Conn. Gen. Stat. § 22A-220A 11

Del. Code Ann. tit. 7 § 6406 (31) (1991) 11

D.C. Code § 6-507 11

Fla. Stat. §§ 403.7063, 403.713 (1986 and Supp. 1992) . 11

Haw. Rev. Stat. § 340A-3(a) 11

Ill. Ann. Stat. c. 34 P 5-1047 11

Ind. Code §§ 36-9-31-3 & 4 11

Iowa Code § 28G.4 11

La. Rev. Stat. 30:2307 (9) 11

Me. Rev. Stat. Ann. tit. 38, § 1304-D (West 1989 and Supp. 1991) 11

Minn. Stat. § 1158.80 (1990 and Supp. 1991) 11

Miss. Code Ann. § 17-17-319 11

Mo. Rev. Stat. § 260.202 11

N.C. Gen. Stat. § 130A-294 11

PAGE

N.D. Cent. Code §§ 23-29-06 (6) & (8) 11

N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5 11

Ohio Rev. Code Ann. § 343.01 (H)(2) 11

Or. Rev. Stat, § 268.317 (3) & (4) 11

Pa. Stat. Ann. tit. 53, § 4000.303(e) 11

R.I. Gen Laws § 23-19-10(40) 11

Tenn. Code Ann. 68-211-814 11

Vt. Stat. Ann. tit. 24, §§ 2203a, 2203b 11

19 V.I.C. § 1570f 11

Va. Code Ann. § 15.1-28.01 11

Wash. Rev. Code §§ 36.58.040, 35.21.120 11

W. Va. Code S 240-2-1h 11

Wis. Stat. § 159.13 (3), (11) 11

Regulations

Federal

43 Fed. Reg. 26611 (1978) 5
56 Fed. Reg. 51009 (1991) 6
40 C.F.R. § 503 6
40 C.F.R. § 256.30 13
40 C.F.R. § 256.31 13

New York State

6 NYCRR Part 360 6

PAGE

Legislative Materials

S. Rep. No. 988, 94th Cong., 2d Sess. (1976) 4

Interstate Transport and Disposal of Solid Waste: Hearing Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works, 101st Cong., 2d Sess. (1990) 4

S. 2877, 102d Cong., 2d Sess. (1992) 29

H.R. Rep. No. 1491, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6238 .....4-7, 11, 13

Staff of the House Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., *Materials Relating to the Resource Conservation and Recovery Act of 1976* 4

Miscellaneous

Brunner, Hubbard, Keller & Newton, *Closing Open Dumps* (EPA 1971) 5

Ferrand, *Records of the Federal Convention* 29

S. Lieberman, *Abandoned Trash in West Virginia is Traced to Local Carbone Site*, Rockland Journal-News, July 26, 1991 at B3 24

D. McClendon, *Radioactive Waste Is Held in Limbo*, Rockland Journal-News, May 17, 1993 at B1 24

Mulvey, "Cost Guidelines for the Recycling Option," *printed in, Selected Papers from the 1989 Conference on Solid Waste Management and Materials Policy* (New York State Legislative Commission on Solid Waste Management, 1989) 14

PAGE

U.S. Congress, Office of Technology Assessment, *Facing America's Trash: What Next for Municipal Solid Waste* (1989) 10

U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action* (1989) .. 10, 12, 13, 28

Office of Solid Waste, U.S. Environmental Protection Agency *Characterization of Municipal Solid Waste in the United States: 1990 Update* (1990) 4

Office of Solid Waste, U.S. Environmental Protection Agency *Characterization of Municipal Solid Waste in the United States: 1992 Update* (1992) 4, 14

INTEREST OF *AMICI CURIAE*

Amici curiae, the State of New York, the City of New York, and the New York State Association of County Attorneys, submit this brief in support of respondent Town of Clarkstown seeking affirmance of the lower court's order in *C & A Carbone, Inc. v. Town of Clarkstown*, 182 A.D.2d 213, 587 N.Y.S.2d 681 (N.Y. App. Div. 1992), *leave to appeal denied*, 80 N.Y.2d 760. 591 N.Y.S.2d (N.Y. 1992).

Flow control ordinances are a vital component of solid waste management throughout New York. New York State has authorized 38 localities and solid waste management units to enact flow control laws so that they can fulfill their responsibility for safe, environmentally-sound management of solid waste. New York City may impose flow control to implement a large-scale food composting program. Many counties throughout the State already rely on flow control as an integral part of their solid waste management plans.

Petitioners ask the Court to invalidate a flow control ordinance that allows a local government to fulfill its obligation to protect the environment and the health of its citizens by managing garbage safely and efficiently. Petitioners' argument, if accepted, will have a devastating impact on the ability of states and localities to address their serious solid waste problems.

There are many types of flow control, each promoting compelling government interests. The flow control ordinance at issue in the instant case, for example, requires that all waste from the Town of Clarkstown be delivered to a transfer station. Other flow control ordinances require delivery of recyclable or compostable materials to a central location. For example, New York City is considering a composting program for food wastes from food stores, restaurants, and institutions. The New York City Health and Hospital Corporation is also developing a program to recycle the plastic components of regulated medical waste. If promulgated, flow control regulations would enable both of these programs to direct recoverable wastes to

recycling or composting facilities developed by the City. Such programs also will reduce the amount of waste disposed of through the less-preferred method of landfilling.

Amici urge the Court to recognize the extremely important public policy goals that are served by the use of various flow controls to address the solid waste crisis and to hold that flow control—as anticipated by Congress in RCRA and as already implemented by more than half the States in the nation—is a constitutionally permissible exercise of the local police power justified by the compelling health and safety benefits that it provides.

SUMMARY OF ARGUMENT

A growing number of states and localities ensure environmentally-sound disposal by directing garbage to a specified solid waste management facility, one which can safely separate or dispose of garbage. Such direction or "flow control" ordinances promote many compelling interests. They: 1) contribute to recycling and energy recovery; 2) reduce solid waste; 3) counter the commingling of hazardous waste; 4) provide a stable financial base for state-of-the-art solid waste management facilities and technologies; 5) ensure that garbage is handled and disposed at an environmentally-sound facility; 6) reduce truck traffic; 7) minimize CERCLA clean-up cost liability; and 8) provide necessary and accurate data on which to base an effective management plan. And while such ordinances promote modern solid waste management strategies, municipal direction of garbage is not a new idea; its history dates back 90 years.

Given these compelling benefits and the responsibility of state and local governments to ensure the safe disposal of garbage and to protect health and environment, flow control ordinances, including the Clarkstown ordinance, do not violate the Commerce Clause. In light of these benefits, the Ordinance's evenhanded nature, and the burdens imposed on Town

residents, the Court should apply the balancing test set forth in *Pike v. Bruce Church* and *Minnesota v. Clover Leaf Creamery*. Furthermore, given the absence of viable alternatives, the Ordinance does not violate the Commerce Clause even under the strict scrutiny test of *Philadelphia v. New Jersey* and *Maine v. Taylor*.

FACTUAL AND STATUTORY BACKGROUND

In the midst of the bicentennial celebration of America's past, Congress recognized that the nation's future was endangered by serious health, safety, and environmental problems resulting from garbage disposal, and enacted the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq*. Recognizing that local governments historically had responsibility for solid waste collection and disposal, RCRA required States and localities to implement environmentally-sound disposal practices. In turn, state and local governments initiated various efforts to reduce the health and environmental hazards.

Waste collection and disposal is a quintessential local responsibility. Consistent with their historic responsibility, numerous localities across New York State have closed their unsafe landfills, arranged for the construction of centrally-located, state-of-the-art solid waste management facilities, and directed that all garbage be delivered to those facilities.

Localities such as Clarkstown do not adopt flow control ordinances in a vacuum. State, County, and Town solid waste management programs, of which flow control ordinances are but a part, are the culmination of the growing scientific awareness of the potential hazards associated with garbage disposal and the development of federal and state solid waste regulations. In the present case, it was only after the New York State Department of Environmental Conservation ("DEC") ordered Clarkstown to close its landfill that the Town arranged for the construction of the transfer station and required that all garbage be delivered

there. To properly understand Clarkstown's ordinance it is necessary to acknowledge those hazards, the evolution of environmental laws governing waste disposal, and the benefits secured by modern solid waste management facilities and flow control ordinances.

A. GARBAGE CAN ENDANGER HEALTH AND THE ENVIRONMENT

Every day, Americans generate 500,000 tons of solid waste. The national volume grew from 88 million tons per year in 1960 to nearly 200 million tons per year in 1990. During the same time, per capita generation of municipal solid waste increased from 2.7 pounds per person per day to 4.3 pounds. The problem of ever-increasing volumes of garbage is compounded by continually shrinking disposal capacity.[1] For example, America's fifty largest cities have exhausted or will soon exhaust their landfill capacity, and in the next ten years, 80% of the currently-operating landfills will close.[2]

Waste disposal can pose health and environmental hazards. For example, decaying landfilled garbage produces leachate, which contains various chemical elements and compounds, including heavy metals, some of which are toxins, and volatile organic compounds ("VOCs"). Oftentimes, leachate seeps into surface or groundwater and can thereby degrade or ruin a community's water supply. Groundwater pollution can have dire and widespread consequences since nearly 50% of Americans depend on groundwater for drinking water.[3] Such con-

[1] *See* Office of Solid Waste, U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update*, ES-9, ES-13 (1990); *id.*, *1992 Update*, ES-3 (1992).

[2] S. Rep. No. 988, 94th Cong., 2d Sess. 1 (1976); H.R. Rep. No. 1491, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6247; *see Interstate Transport and Disposal of Solid Waste: Hearing Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 101st Cong., 2d Sess. 2 (1990).

[3] *See* Staff of the House Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 94th

tamination requires extensive and expensive cleanup measures. Sometimes it is irreversible.[4]

In the present case, leachate from Clarkstown's landfill migrated into the surrounding ground and surface water, and "present[ed] a significant threat to the public health [and] the environment" according to the DEC. R. 203. The Clarkstown site is not unique. For instance, the New York State Legislature has required the closure of all Long Island landfills without double liners because they threaten to contaminate irreversibly the aquifer that provides drinking water for the region's 2.5 million inhabitants. ECL § 27-0704(5); *see* 43 Fed. Reg. 26611 (1978) (EPA determination of vulnerability).

Decaying garbage also produces methane gas emissions. If not properly managed, methane can ignite, killing people and destroying buildings. H.R. Rep. 94-1491 at 37-8, *reprinted in* 1976 U.S.C.C.A.N. at 6275-6. The recent explosion at the Frisbee Avenue housing development in Albany demonstrates methane's potentially sinister consequences. Also, in March 1992, the fire from a methane explosion at the Camillus, New York landfill took several weeks to extinguish.

In addition, fires at landfills can spew clouds of particulates and incompletely burned gases and can contribute to human respiratory diseases, darken the skies, cause additional surface and groundwater contamination, and interfere with air and surface transportation. Like methane explosions, landfill fires have resulted in fatalities. H.R. Rep. 94-1491 at 37-8; *see* Brunner, Hubbard, Keller & Newton, *Closing Open Dumps* 2 (EPA, 1971).

Cong., 2d Sess., *Materials Relating to the Resource Conservation and Recovery Act of 1976*, at 26, 39 (1976); H.R. Rep. No. 1491, 94th Cong., 2d Sess. 89-90 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6325.

[4] *Environmental Defense Fund, Inc. v. Costle*, 439 F. Supp. 980, 986, n. 3 (E.D.N.Y. 1977) (noting that if Long Island's aquifer became polluted "it would take as long as 3,000 years for [it] to be flushed clean").

Each of the above health and environmental dangers increases geometrically when generators, haulers, or landfill operators improperly dump hazardous waste into municipal solid waste landfills.[5] Faced with these hazards and given the responsibility for protecting health and the environment, states and localities now are constructing and upgrading solid waste facilities to handle solid waste in an environmentally-sound and reliable manner. Few would deny that "[t]he modern landfill is a technically complex engineering exercise that comes replete with liners, leachate collection systems and highly regulated operating conditions." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, — U.S. —, —, 112 S.Ct. 2019, 2030 (1992) (Rehnquist, C.J., and Blackmun, J., dissenting); *see* 56 Fed. Reg. 51009 (1991). Compost operations, waste-to-energy facilities, recycling centers, and transfer stations are similarly complex. *See* 40 C.F.R. § 503; 6 New York Codes Rules and Regulations §§ 360-3, 360-4, 360-5, 360-11, 360-12.

B. FEDERAL & STATE ENVIRONMENTAL REGULATION

1. The Resource Conservation and Recovery Act

Congress enacted RCRA, in part, to address the health and environmental problems caused by unsafe solid waste disposal facilities, unsound disposal practices, and weak regulation. Traditionally, responsibility for garbage collection and disposal has been vested in state and local governments as part of their general police powers. Under RCRA, states and localities retain that responsibility. RCRA § 1002 (a)(4), 42 U.S.C. § 6901 (a)(4). Accordingly, one of RCRA's central objectives was to:

[5] *See* H.R. Rep. 94-1491 at 17-23, *reprinted in* 1976 U.S.C.C.A.N. at 6255-61 (containing specific examples from across the country of the dumping of hazardous waste in landfills and the resulting damage caused by migrating leachate).

> provid[e] technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will *promote* improved solid waste management techniques (including more effective organizational arrangements), *new and improved methods of collection, separation, and recovery of solid waste, and environmentally safe disposal of nonrecoverable residues.*

RCRA § 1003, 42 U.S.C. § 6902 (emphasis added); *see* RCRA § 4001, 42 U.S.C. § 6941.

As part of the overall strategy to ensure recycling, energy recovery, resource conservation, and environmentally-sound disposal, Congress recognized the need for new, environmentally-sound solid waste management facilities and required the closure of unsafe landfills. RCRA § 4005, 42 U.S.C. § 6945. Congress also recognized that guaranteed waste streams could help finance innovative resource recovery facilities, such as recycling, composting, and waste-to-energy facilities, and that prohibitions against long-term agreements for supplying garbage would forestall the construction of such facilities and thereby threaten effective solid waste management planning. H.R. Rep. 94-1491 at 34, *reprinted in* 1976 U.S.C.C.A.N. at 6272. To qualify for federal funding, each state plan

> (2) . . . shall . . . prohibit the establishment of new open dumps within the State and contain the requirement that all solid waste (*including solid waste originating in other states. . .*) shall be (A) utilized for resource recovery or (B) disposed of in sanitary landfills . . . or otherwise disposed of in an environmentally sound manner;
>
> . . . .
>
> (5) . . . shall provide that no local government within the state shall be prohibited under state or local law from entering into long-term contracts for the supply of solid waste to resource recovery facilities . . . .

RCRA § 4003 (a)(2), (5) (emphasis added)[6]. By abolishing prohibitions against long-term contracts, Congress freed local governments to develop long-range plans and to conclude long-term contracts for waste streams thereby encouraging localities to move beyond mediocre, interim facilities. The requirement that *all* solid waste within a state be recycled or disposed of in a safe manner coupled with the ability to enter into long-term contracts thus provided strong incentives for local governments to control their waste streams and to develop solid waste management facilities that provide a safe and long-term solution to the solid waste crisis.

2. New York State's Comprehensive Solid Waste Management Statutes

Much of New York State's solid waste management law, ECL Title 27, was enacted in response to RCRA.[7] Like Congress, the New York State Legislature found "that unwanted residues of our society have polluted many of our land and water resources, while at the same time depleting our finite stock of natural resources." L. 1980, c. 552, § 1. Consistent with traditional responsibilities, the statute provides that localities and counties have primary responsibility for solid waste management. ECL §§ 27-0101(2); 27-0107; 27-0711.

Title 27 promotes the development of new, environmentally-sound solid waste management facilities as well as the implementation of a comprehensive solid waste management plan in accordance with RCRA. L. 1980, c. 552, § (1)(a). Also, the statute seeks to eliminate barriers and provide incentives for long-term efficient solid waste management. L. 1980, c. 552,

[6] Subsection (a)(5) was amended by the Solid Waste Disposal Act of 1980 to further ensure that states and localities faced no obstacles in developing long-term commitments for recycling and resource recovery. 42 U.S.C. § 6943 (a)(5).

[7] L. 1977, c. 425, § 6 and L. 1980, c. 552, § (1)(b)(2) both state that New York's solid waste legislation was enacted, in part, to conform to RCRA. *See also* ECL § 27-0103.

§ (1)(b). Consistent with RCRA and EPA regulations, the New York State Legislature established the following solid waste management priorities:

> (a) first, to reduce the amount of solid waste generated;
>
> (b) second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;
>
> (c) third, to recover, in an environmentally acceptable manner, energy from solid waste that cannot be economically and technically reused or recycled;
>
> (d) fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the [DEC].

ECL § 27-0106(1). In order to achieve these goals and recognizing that solid waste management facilities are complex and capital-intensive, the New York State Legislature on 38 separate occasions has granted localities and planning units the authority to control the handling of all solid waste within their jurisdictions.[8] The Rockland County Solid Waste Treatment and

[8] *See* L. 1976, c. 913 (Niagara County); L. 1979, c. 509 (Town of Oyster Bay); L. 1979, c. 510 (Town of North Hempstead); L. 1980, c. 560 (New York City); L. 1981, c. 932 (Onondaga County); L. 1982, c. 632 (Town of Islip); L. 1982, c. 675 (Dutchess County); L. 1983, c. 502 (St. Lawrence County); L. 1983, c. 513 (Washington County); L. 1983, c. 930 (Broome County); L. 1984, c. 638 (North Hempstead Solid Waste Management Authority); L. 1985, c. 478 (Town of Babylon); L. 1985, c. 670 (Jefferson and Lewis Counties); L. 1985, c. 697 (Essex County); L. 1985, c. 797 (Town of Hempstead); L. 1986, c. 627 (Western Finger Lakes Solid Waste Management Authority); L. 1986, c. 840 (Town of Huntington); L. 1986, c. 936 (Ulster County); L. 1987, c. 71 (Warren County); L. 1987, c. 485 (Orleans County); L. 1987, c. 747 (Montgomery, Otsego, and Schoharie Counties); L. 1987, c. 773 (Saratoga County); L. 1988, c. 627 (Oneida and Herkimer Counties); L. 1988, c. 665 (Franklin County); L. 1988, c. 667 (Town of Brookhaven); L. 1988, c. 670 (Essex County); L. 1989, c. 80 (Town of Smithtown); L. 1989, c. 726 (Eastern Rensselaer

Disposal Act, L. 1991, c. 569, authorizes localities in Rockland County, such as the Town of Clarkstown, to require that "all solid waste generated, originated or brought within their respective boundaries . . . shall be delivered to a specified solid waste management resource recovery facility" including a transfer station.

Rockland County has developed a comprehensive solid waste management plan that includes the implementation of a source-separation program for various recyclables, and the development of composting facilities, materials recovery facilities, and an environmentally-sound landfill. The Clarkstown transfer facility plays an integral role in the operation of the County Plan.

C. FLOW CONTROL PROMOTES MANY COMPELLING BENEFITS

Taking responsibility for waste recycling, energy recovery, waste reduction, and environmentally-sound waste disposal requires the ability to direct the flow of waste. Absent such control, state and local efforts to ensure safe and efficient waste disposal will fail. *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action* 14 (1989); U.S. Congress, Office of Technology Assessment, *Facing America's Trash: What Next for Municipal Solid Waste* 275 (1989).

Flow control is not a recent innovation. Ordinances directing garbage to a specific landfill or hauler are at least 90 years old. In 1905 this Court upheld two such ordinances against takings claims as valid exercises of the police power. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306

County); L. 1991, c. 369 (Madison County); L. 1991, c. 540 (Fulton County); L. 1991, c. 631 (certain towns in Westchester County); L. 1992 c. 252 (Tompkins County); L. 1992, c. 350 (Greene County); L. 1992, c. 369 (Sullivan County); L. 1992, c. 391 (Greater Troy Solid Waste Management Authority); L. 1992, c. 567 (Town of Riverhead); L. 1992, c. 629 (Westchester County).

(1905); *Gardner v. Michigan*, 199 U.S. 325 (1905). More recently, when Congress enacted RCRA, it recognized that various states and localities already "require all discarded materials be transported to a particular location" and it made clear that the legislation did not interfere with such flow control ordinances. H.R. Rep. 94-1491 at 34. At least twenty-nine states and territories have now adopted flow control ordinances.[9]

Flow control promotes New York State public policy as expressed in ECL § 27-0106, *supra* at 9, by providing at least eight benefits. First, flow control promotes the twin goals of energy recovery and recycling, two cornerstones of federal and state policy. By requiring all solid waste to be delivered to a central location, towns and their agents can ensure—in the most efficient manner possible—that all materials that can be

[9] *See e.g.*, Colorado (Colo. Rev. Stat. § 30-20-107); Connecticut (Conn. Gen. Stat. § 22A-220A); Delaware (Del. Code Ann. tit.7 § 6406 (31) (1991)); District of Columbia (D.C. Code § 6-507); Florida (Fla. Stat. §§ 403.7063; 403.713 (1986 and Supp. 1992)); Hawaii (Haw. Rev. Stat. § 340A-3(a)); Illinois (Ill. Ann. Stat. c. 34 P 5-1017); Indiana (Ind. Code §§ 36-9-31-3 & 4); Iowa (Iowa Code § 28G.4); Louisiana (La. Rev. Stat. 30:2307 (9)); Maine (Me. Rev. Stat. Ann. tit. 38, § 1304-D (West 1989 and Supp. 1991)); Minnesota (Minn. Stat. § 1158.80 (1990 and Supp. 1991)); Mississippi (Miss. Code Ann. § 17-17-319); Missouri (Mo. Rev. Stat. § 260.202); New Jersey (N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5); New York (1991 N.Y. Laws, c. 569, at 1687-89); North Carolina (N.C. Gen. Stat. § 130A-294); North Dakota (N.D. Cent. Code §§ 23-29-06(6) & (8)); Ohio (Ohio Rev. Code Ann. § 343.01 (H)(2)); Oregon (Or. Rev. Stat § 268.317 (3) & (4)); Pennsylvania (Pa. Stat. Ann. tit. 53, § 4000.303(e)); Rhode Island (R.I. Gen Laws § 23-19-10(40)); Tennessee (Tenn. Code Ann. 68-211-814); Vermont (Vt. Stat. Ann. tit. 24, §§ 2203a, 2203b); Virginia (Va. Code Ann. § 15.1-28.01); Washington (Wash. Rev. Code § 36.58.040, 35.21.120); West Virginia (W. Va. Code S 240-2-1h); Wisconsin (Wis. Stat. § 159.13(3), (11)); Virgin Islands (19 V.I.C. § 1570f).

Flow control, of course, does not violate the Sherman Act. *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 425 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985); *see Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

removed from the solid waste stream for energy recovery or recycling are indeed removed from the waste stream. Monitors divert recyclable material improperly included in the waste stream and deter improper disposal practices.

Second, flow control promotes the related goal of solid waste reduction, "a key strategy in [New York's] solid waste management policy." L. 1988, c. 70, § 2. By imposing volume-based disposal costs reflective of state-of-the-art technology, flow control ordinances encourage citizens and corporations to reduce the amount of waste they produce. *See Agenda for Action* at 34. Additionally, the removal of all materials from the solid waste stream for energy recovery, composting, and recycling reduces, by definition, the volume of solid waste. Less solid waste translates into fewer health and environmental hazards at downstream landfills.

Third, by funnelling all solid waste to a central location, flow control allows localities to thoroughly monitor the solid waste stream to ensure that hazardous and medical wastes are not commingled with solid waste. Commingling is not a hypothetical problem. Tainted solid waste damages a municipality's reputation, making it more difficult and more expensive to dispose of its solid waste, and increases the health and environmental hazards to those communities that surround compost or landfill facilities as well as to those who work at such facilities. Absent flow control, towns could not check the entire waste stream and intercept commingled waste. Flow control provides an efficient and necessary first line of defense against the commingling of hazardous and medical waste.

Fourth, both Congress and the State Legislature expressly recognized that guaranteed waste streams are crucial to the success of state-of-the-art resource recovery facilities. *See* H.R. Rep. No. 94-1491 at 34. Flow control regulations provide the investment security for such necessary projects. *Hybud Equipment Corp. v. Akron*, 654 F.2d 1187, 1190 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*,

742 F.2d 949 (1984), *cert. denied*, 471 U.S. 1004 (1985). By ensuring a steady, long-term supply of garbage, flow control provisions provide a broad financial base for revenue bonds. Such a secure, long-term foundation makes the solid waste facility an attractive investment. Absent flow control, waste-flight will disrupt and destroy the formation of a secure financial base, and revenue bonds will not be marketable. *See Central Iowa Refuse Systems*, 715 F.2d 419, 422-27; *Hybud*, 654 F.2d at 1190.[10]

In a similar manner, by guaranteeing a waste stream and stabilizing a market, flow control fosters the development of innovative recycling, composting, and energy-recovery technologies. This encouragement of new technologies was clearly contemplated by Congress when it enacted RCRA. H.R. Rep. 94-1491 at 34; *see also* 40 C.F.R. §§ 256.30, 256.31. For example, flow control can assist New York City in developing cutting-edge technology for large-scale composting of food wastes. The inability to utilize flow control will inhibit the development of new technologies and programs as well as the construction of environmentally-sound solid waste management facilities. *See Agenda for Action* at 14.

Fifth, separate and apart from providing the financial base for solid waste management facilities, flow control also ensures that garbage is actually shipped to and disposed of at environmentally-sound facilities. As recognized by Congress and the State Legislature, such facilities are essential if localities are to effectively address the garbage crisis. Flow control helps towns to guarantee that garbage is disposed of at an authorized

[10] In New York, $2 billion in revenue bonds have been issued over the past ten years to finance solid waste management projects. In localities with flow control, approximately $1 billion in revenue bonds are currently outstanding. Any displacement of flow control could undermine such bonds, threaten bondholders' investments, and trigger litigation rivaling the "WPPSS" saga. *See generally In re Washington Public Power Supply System*, 720 F. Supp. 1379 (D. Ariz 1989), *aff'd*, 955 F.2d 1268 (9th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 408 (1992).

facility even if flow control is not needed to finance the facility.

Sixth, flow control helps states and localities avoid financial exposure. Under *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992), a municipality may be liable for CERCLA clean-up costs incurred at disposal sites where its waste was dumped. *See* 42 U.S.C. § 9601 *et seq*. By directing municipal solid waste to a specific environmentally-sound disposal facility, localities can avoid or minimize such liability. *Northside Sanitary Landfill v. Indianapolis*, 902 F.2d 521 (7th Cir. 1990) (city may concentrate its garbage at a single site given concern about clean-up costs at another site).

Seventh, in the context of transfer stations, flow control can reduce the volume of truck traffic as well as the volume of garbage transported to another facility. Transfer stations reduce waste volume by removing recyclables and then compacting the residue for shipment. Also, by consolidating the contents of several collection trucks for shipment in one larger truck, transfer stations reduce truck traffic. Mulvey, "Cost Guidelines for the Recycling Option," *printed in Selected Papers from the 1989 Conference on Solid Waste Management and Materials Policy* (New York State Legislative Commission on Solid Waste Management, 1989); *Filiberto Sanitation, Inc. v. State of New Jersey Dept. of Environmental Protection*, 857 F.2d 913, 920 (3rd Cir. 1988).

Eighth, by providing municipalities an opportunity to obtain an accurate characterization of their waste streams, flow control provides an indispensable tool for developing a viable, comprehensive solid waste management plan. *Filiberto Sanitation*, 857 F.2d at 920. According to the EPA, the identification of the waste stream's components and volume is an indispensable first step towards solving the problems associated with garbage generation and disposal. Office of Solid Waste, U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992 Update* ES-1 (1992). Similarly, New York statutes require local solid waste management plans to contain, first and foremost, a "characteriz[ation of] the solid waste stream." ECL § 27-0107(1)(b)(i); *accord* ECL § 27-0405(2)(a).

For these reasons, flow control promotes many compelling local, state, and national interests.

D. THE CLARKSTOWN TRANSFER STATION PROTECTS THE COMMUNITY'S HEALTH AND ENVIRONMENT

1. The Clarkstown Landfill

The Clarkstown landfill opened in 1950. In 1980 DEC determined that the landfill constituted a "significant threat to the public health [and] the environment." R. 181, 202-03. Garbage was placed directly into the groundwater, and leachate was seeping into the groundwater and threatening the drinking water. R. 175-76. Therefore, DEC ordered the Town to close the landfill, listed it in the Registry of Inactive Hazardous Waste Disposal Sites, and assessed significant penalties. R. 189, 203. As a result of DEC's enforcement action, the Town agreed to construct a state-of-the-art transfer station that ultimately would form part of a county-wide solid waste management program. A private contractor, Recycling Center Inc. ("RCI"), constructed and operates the transfer station, charging $81 per ton of trash.[11] While petitioners complain about the Town's tipping fee, the difference in operations between their facility and Clarkstown's more than justifies the 15% differential.

2. Clarkstown's Transfer Station & Petitioners' Facility

Petitioners' characterization of the "simpl[e] transfer station," Pet. Br. at 13, masks the complexity of the Clarkstown facility. To gain access, each truck must first pass between two

[11] The Town has an option to purchase the station in 1995.

geiger counters to ensure no radioactive waste is present. Next, a Town employee examines the truck's manifest and weighs the truck. Video cameras record each entry. The transfer station itself is a huge three-story building, with a large bay area inside on the second floor where the solid waste is deposited. Here, Town and RCI employees visually check the waste for the presence of recyclables, hazardous waste, and medical waste. A roof and walls surround the transfer bay and contain blowing litter and unpleasant odors. Workers and machines then segregate recyclable materials such as tires, wood, cardboard, metal, branches, and yard clippings. The tires, metal, and cardboard are shipped to recycling centers. The Town pulverizes the wood and yard clippings and deposits the residue in the Town's compost field, located next door. After the recyclables are separated, machines load the non-recyclable residue into tractor-trailer dump trucks waiting below on the first floor or compress it for other trucks. The tipping fee charged by the Clarkstown facility reflects the cost of the environmentally-sound practices employed at a state-of-the-art facility.

In contrast, petitioners' site has no perimeter fence, no enclosed dumping bay, no enclosed loading area, and no radioactive waste sensors. Also, petitioners' recycling claims ring hollow in light of the police investigation that revealed that petitioners send recyclable material, such as steel rims and truck springs, to landfills and incinerators. R. 50, J.A. 17. Moreover, it appears that petitioners improperly mixed medical waste, including surgical gloves and intravenous feeding bags, with the solid waste. J.A. 17. While petitioners assert that they deal only in non-Clarkstown or non-New York State waste, the police officers' identification of Clarkstown waste at the site of the March 8, 1991 highway accident belies that claim. R. 55-6. Given these practices, it is no surprise that petitioners wish to avoid the inspection regimen of the Clarkstown facility.

ARGUMENT

FLOW CONTROL PROVIDES SUBSTANTIAL LOCAL BENEFITS WITHOUT RESTRICTING INTERSTATE COMMERCE

A. The Purpose of the Commerce Clause

The dormant Commerce Clause acts as a limitation on the states' authority to erect protectionist state barriers that would threaten the operation of the federal union. The Commerce Clause has been construed to preserve our "national solidarity" by preventing states from isolating themselves from problems common to all and fomenting "rivalries and reprisals" similar to those that existed under the short-lived Articles of Confederation. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935); *West v. Kansas Natural Gas*, 221 U.S. 229 (1911). This grant of general power upon Congress to regulate commerce, however, did not preempt the states' police powers. "[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the State to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 350 (1977); *Parker v. Brown*, 317 U.S. 341, 360-61 (1943). Although petitioners apparently view the Commerce Clause as a constitutional antitrust provision, its focus instead is the protection of interstate markets, not particular interstate companies, from unduly burdensome regulations. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978).

B. Standard Of Review

This Court has developed two standards of review in analyzing Commerce Clause issues. First, economically protectionist regulations, that is, those regulations that discriminate against interstate commerce in favor of in-state interests, are subject to strict scrutiny. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *Philadelphia v. New Jersey*, 437

U.S. 617, 624 (1978). A court may find that a state law constitutes "economic protectionism" (1) if the statute differentiates between in-state and out-of-state interests by favoring the former or burdening the latter or (2) if the statute was motivated by a discriminatory purpose. The inquiry into whether or not a discriminatory purpose motivated the statute usually centers on the legislative history behind the enactment. *See Washington Apple*, 432 U.S. 333, 352; *Clover Leaf Creamery*, 449 U.S. at 471, n. 15; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269-71 (1984). While in practice, the strict scrutiny standard results in a virtual *per se* rule of invalidity, "[a]s long as a state does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (citation omitted).

Second, in contrast to protectionist regulations, "evenhanded" regulations, that is, those regulations that apply equally to in-state and out-of-state interests, are subject to a balancing test outlined in *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970). Under the *Pike* standard, an "evenhanded" state regulation is valid even if it effects an incidental burden on interstate commerce so long as that burden is not clearly excessive in relation to the local benefits. The examination of "incidental burdens on interstate commerce" is a comparative standard, and focuses on the degree to which a state action burdens interstate commerce relative to intrastate commerce. *Clover Leaf Creamery*, 449 U.S. at 471-72; *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960). Where the burden on out-of-state interests is no different from that placed on similar in-state interests, there is no burden on *interstate* commerce; rather, there is only a constitutionally unobjectionable burden on all commerce. Thus, evenhanded legislation will normally be upheld.[12]

[12] Only in rare instances, such as in *Pike* itself, where there are *both* substantial costs imposed on out-of-state interests and *de minimus* local benefits, will evenhanded regulations be struck down.

C. The Strict Scrutiny Test Is Inapplicable

In contrast to their position below where they urged the trial Court to apply the *Pike* balancing test, petitioners now strenuously argue that the strict scrutiny standard should apply. Pet. App. 19a. The strict scrutiny test has no application here. To begin with, the Ordinance is facially neutral. The Ordinance applies to "all solid waste within or generated within the Town." To that end, "*[a]ll* solid waste . . . shall be removed, transported and/or disposed of only by carters licensed [by the Town]" and *any* and *all* solid waste, regardless of origin, is to be transported and delivered to the Town's transfer station. Pet. App. 50a-53a (emphasis added). Moreover, the Town has established a single, uniform tipping fee for each ton of solid waste brought to the transfer station, regardless of its origin. Thus, the Ordinance "visits its effects on both interstate and local business." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987).

Even if the Ordinance is perceived as burdening the interstate flow of solid waste, it is clear that the Ordinance similarly burdens Clarkstown garbage. The Ordinance's equal treatment of interstate and local solid waste defeats application of the strict scrutiny standard. In each decision applying that standard the Court has been confronted by a statute that imposed an export or import ban of a certain good, while permitting the continuation of in-state trade in that good. *Philadelphia v. New Jersey*, 437 U.S. 617 (law precluded out-of-state trash from being disposed of in New Jersey, but did not similarly restrict disposal of New Jersey trash); *Fort Gratiot*, — U.S. —, 112 S.Ct. 2019 (same effect); *Chemical Waste Mgmt. Inc. v. Hunt*, — U.S. —, 112 S.Ct. 2009 (1992) (law established higher tipping fee for out-of-state-solid waste but did not so burden in-state waste); *Baldwin*, 294 U.S. 511 (statute barred retail sale of Vermont- produced milk in New York); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (law precluded export of Oklahoma minnows for sale, but allowed in-state sales). It is discrimination against the *inter*state movement of goods, while favor-

ing or failing to burden the *intra*state movement of goods, that triggers the strict scrutiny standard. This point was made most clearly in *Philadelphia v. New Jersey* where the Court stated that while New Jersey could not stem the depletion of landfill capacity by blocking the disposal of only out-of-state trash, it could pursue that goal without violating the Commerce Clause by slowing the flow of all waste, both in-state and out-of-state, into its landfills, even though such a strategy would impede the flow of out-of-state waste across its border. 437 U.S. at 626.

Unlike the situations in *Washington Apple*, 432 U.S. at 352, or *Bacchus*, 468 U.S. at 269-71, there is no evidence of discriminatory purpose behind the Ordinance. Here, the Town Board arranged for the facility's construction and adopted the Ordinance only after DEC determined that the landfill constituted a danger and ordered it closed. The purpose of the Ordinance was to ensure the delivery of all solid waste to the transfer station so as "to benefit the health, welfare, and safety of the town residents." Pet. App. 50a. These articulated purposes deserve deference, *see Clover Leaf Creamery*, 449 U.S. at 463 n. 7, 471 n. 15, and include promoting New York State's public policy of reducing solid waste volume, increasing resource recovery and recycling, and ensuring safe and reliable handling of solid waste. Even if the Ordinance primarily burdened interstate companies, which it does not, that fact "does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce." *Exxon*, 437 U.S. at 125. Discrimination simply is not present.[13] Far from protecting the Town residents' economic interests, the Ordinance works to the residents' economic disadvantage since the same $81 tipping fee that applies to out-of-state haulers also applies to all in-state haulers that come to the facility. Given this equal treatment, it cannot be said that Clarkstown is imposing the "full burden" of supporting the transfer facility upon out-of-state interests. *Philadelphia v. New Jersey*, 437 U.S. at 628. Restrictions on out-of-state interests are permissible so long as they are evenly applied to in-state interests. "Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the state." *Sporhase v. Nebraska*, 458 U.S. 941, 955-56 (1982). Here, "[t]he existence of major in-state interests adversely affected by the [law] is a powerful safeguard against legislative abuse" and justifies the application of the balancing test. *Clover Leaf Creamery*, 449 U.S. at 473 n. 17; *South Carolina State Highway Dept. v. Barnwell Bros. Inc.*, 303 U.S. 177, 187 (1938); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675 (1981); *Fort Gratiot*, 112 S.Ct. at 2029 (Rehnquist, C.J., and Blackmun, J., dissenting).

[13] The Clarkstown facility ships non-recyclable solid waste to many of the same sites to which petitioners shipped waste. Accordingly, petitioners' suggestion, Pet. Br. at 34-5, that the Clarkstown facility "obstruct[s] the use of solid waste as a source of energy" is disingenuous.

D. Under the *Pike* Balancing Standard, the Ordinance Is Valid

This Court has applied a balancing test to several evenhanded regulations, like the Clarkstown Ordinance, that do not differentiate between in-state and out-of-state interests. In *Clover Leaf Creamery*, the Court applied the balancing test and upheld a statute that prohibited all retailers from selling milk in plastic, non-returnable cartons. Although the statute did burden out-of-state plastic manufacturers, "this burden [was] not 'clearly excessive' in light of the substantial state interests in promoting conservation of energy and other natural resources and easing solid waste problems." 449 U.S. at 473; *see Huron Portland Cement*, 362 U.S. at 448 (burden did not outweigh benefits of evenhanded smoke abatement ordinance).

In a Commerce Clause challenge against a similar flow control law, the Third Circuit Court of Appeals applied the *Pike* test and upheld the statute. *Filiberto Sanitation, Inc. v. New Jersey Dept. of Environmental Protection*, 857 F.2d 913, 919-

22 & n.1 (3d Cir. 1988). The regulation in *Filiberto Sanitation* provided several benefits including ensuring the proper disposal of all trash, reducing truck traffic, providing accurate data for planning purposes, facilitating long- and short-term contracts for final disposal, and discouraging illegal dumping by directing garbage to prescribed sites. The county transfer station charged $100 per ton. Filiberto claimed it charged $50 per ton. *Id.* at 916.

Recognizing that legitimate health and safety regulations may unavoidably effect an incidental burden on interstate commerce, *id.* at 918-19 (citing cases), the Third Circuit focused on whether the regulation saddled out-of-state interests with the burden of the solution to New Jersey's solid waste problem. The court held that the regulation did not constitute economic protectionism because: it applied equally to in-state and out-of-state interests, *id.* at 921; no discriminatory purpose was identified, *id.* at 920-21, and the garbage continued to flow into interstate commerce. Accordingly, the court declined to apply the heightened scrutiny standard and instead applied the balancing test. Finding no burden that discriminated against interstate commerce and the existence of compelling local benefits, the Third Circuit rejected the Commerce Clause challenge. *Id.* at 922.

The Sixth Circuit Court of Appeals has also upheld an ordinance directing that all trash be delivered to a waste-to-energy plant. *Hybud Equipment Corp. v. Akron*, 654 F.2d 1187 (6th Cir. 1981). The Sixth Circuit balanced the parties' claims. Since the ordinance was a legitimate exercise of the police power and its burden "f[e]ll hardest" on Akron residents and interests, it did not constitute a discriminatory burden on out-of-state interests and did not violate the Commerce Clause. 654 F.2d at 1194-95; *see also In re Waste Disposal Agreement*, 237 N.J. Super. 516, 568 A.2d 547 (N.J. Super. 1990); *In re Fiorillo Bros.*, 242 N.J. Super. 667, 577 A.2d 1316 (N.J. Super. 1990); *Harvey & Harvey, Inc. v. Delaware Solid Waste Auth.*, 600 F. Supp. 1369, 1379-1381 (D. Del. 1985).

Like fire and police protection, the control of local sanitation—including garbage collection and disposal—remains a paradigmatic example of the exercise of municipal responsibility and power. *California Reduction Corp.*, 199 U.S. 306; *Gardner v. Michigan*, 199 U.S. 325. As the Second Department correctly noted below, "[l]ocal governments have long been authorized to enact laws relating to the 'safety, health, and well-being of persons or property' (N.Y. Const., Art. IX, § 2 [c][10]), and it is well settled that the regulation of solid waste collection and disposal, a function traditionally entrusted to State and local governments, is fundamentally related to the public health and welfare." Pet. App. 9a (citations omitted).

Police power ordinances, such as Clarkstown's, have a strong presumption of validity. As this Court stated in *California Reduction*, "[e]very intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety." 199 U.S. at 319. This is so because states retain the authority to regulate matters of state and local concern on which Congress has not spoken. *See Parker v. Brown*, 317 U.S. at 360-363. Given the hazards associated with garbage and its negative economic value, *see Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 253 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990), and their traditional responsibility for garbage disposal, states and localities have, and must continue to have, the power to direct garbage to facilities that can safely dispose of it. As the Appellate Division recognized below, the focus of such police power regulation is "public welfare, rather than profit." Pet. App. 10a. "Where Congress has not acted, a state's own health and safety-oriented trash disposal regulation violates no federal constitutional precepts, provided it neither unduly protects its own citizens nor discriminates against another state's citizens." *In re Waste Agreement*, 568 A.2d at 555; *Parker v. Brown*, 317 U.S. at 367. Moreover, where such regulations are consistent with overall Congressional legislation, as in the present case, they should receive greater deference.

As set forth *supra* at 10-15, flow control ordinances promote many compelling governmental purposes. Clarkstown's Ordinance similarly fosters important interests. The Ordinance ensures that all recyclables are removed from the waste stream and thereby promotes the conservation of energy and other natural resources. Petitioners' attempted disposal of recyclable materials at a landfill, J.A. 16-17, underscores the need for flow control. Moreover, by increasing recycling and imposing volume-based disposal costs, the Ordinance promotes the reduction of the overall volume of solid waste to the fullest extent possible. These two goals constitute "substantial state interest[s]." *Clover Leaf Creamery*, 449 U.S. at 473; RCRA § 4001, 42 U.S.C. § 6941; ECL § 27-0106(1). Additionally, the Ordinance allows Town and DEC officials to inspect deliveries to ensure individuals or corporations are not avoiding DEC's medical or hazardous waste regulations. The benefits of flow control and comprehensive inspections were recently demonstrated when the monitors detected radioactive waste and thereby prevented the contamination of the waste stream. D. McClendon, *Radioactive Waste is Held in Limbo*, Rockland Journal-News, May 17, 1993, at B1. Furthermore, the Ordinance contributes to the financial viability of the facility. By designating a single delivery site for solid waste, the Town also ensures that garbage is handled by an environmentally-sound facility and augments ordinances that prohibit "midnight dumping" in remote areas. The Town has cause to be concerned about this issue. *See* S. Lieberman, *Abandoned Trash in West Virginia is Traced to Local Carbone Site*, Rockland Journal-News, July 26, 1991, at B3. Lastly, the Ordinance ensures that town officials will have a complete, accurate, and ongoing understanding of the waste stream, allowing effective planning.

Even assuming, however, that the Ordinance effects some burden on interstate commerce, it is only incidental and should not defeat the evenhanded Ordinance which promotes compelling state and local interests. *Clover Leaf Creamery*, 449 U.S. at 471-73; *Huron Portland Cement*, 362 U.S. at 448

(evenhanded city smoke abatement ordinance upheld, despite requirement that ships passing in interstate waters would have to modify their boilers, given important city interest "to better the health and welfare of the community"); *Parker v. Brown*, 317 U.S. at 367 (price stabilization program upheld "although it undoubtedly affected the commerce by increasing the interstate price of raisins and curtailing interstate shipments"). Thus, where, as here, the challenged regulation imposes no burden on out-of-state interests and promotes compelling local interests the Court should uphold the Ordinance.

E. Given the Compelling Non-Economic Interests Fostered by the Ordinance and the Absence of Other Alternatives, the Town Ordinance Is Constitutional Under Either Standard of Review

Under either the strict scrutiny standard or the balancing test, the statute should be found constitutional because less-discriminatory alternatives are not available to preserve the compelling, non-economic local interests. *Maine v. Taylor*, 477 U.S. at 137-38; *see Fort Gratiot*, 112 S.Ct. at 2027-28. Petitioners have suggested the creation of a solid waste tax district or raising the property tax as a "non-discriminatory" alternative to flow control. Pet. Br. at 27-29, 36. This argument incorrectly assumes that the sole purpose of flow control is to finance solid waste management facilities. As discussed, *supra* at 10-15, flow control serves many compelling local purposes in addition to facility financing.

Lack of control over garbage will doom any attempt at long range solid waste planning and could well leave solid waste facilities underutilized or standing idle. More importantly, taxes do not direct garbage to authorized, environmentally-sound facilities. Additionally, taxes, unlike tipping fees, will not bring about a reduction of solid waste nor will they promote recycling because a general tax is too far removed from the production of garbage to be an effective tool in encouraging waste reduction. Just as water meters discourage water

waste and allow users to be billed according to the quantity they consume, tipping fees will encourage waste reduction and will impose, quite properly, the greatest costs on those who produce the most waste. Since taxes do not affect disposal habits, they cannot effectuate the federal and state goals to increase recycling and resource recovery and reduce waste. Unlike channeling solid waste to a central point where it is inspected and materials are removed, taxes do not allow municipalities to ensure that recyclable goods are removed from the waste stream. Also, the erection of a tax regime in place of flow control would allow haulers to avoid the radiation detection check and inspection by town personnel. Haulers then could mix hazardous and medical waste with solid waste. Similarly, a tax regime provides no effective means to minimize CERCLA liability or to analyze the waste stream to support long-term planning. Lastly, with no requirement that trash be reduced and compacted for efficient shipments in long-bed trucks, the number of truck trips would increase and savings in gasoline economy would be lost.

The so-called "processing" cases cited by petitioners are inapplicable. Pet. Br. at 19-22. None of these decisions involved a regulation to protect the community's health and environment. The state policies at issue in those cases do not rise to the level of a state's *responsibility* to protect the health and environment of its citizens. *See Toomer v. Witsell*, 334 U.S. 385 (1948) (regulation designed to increase employment in state shrimp industry); *South Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 85-6, n. 5 (1984) (regulation designed to protect in-state employees resulted in the production of "cants," a semi-processed timber product of dubious utility); *Pike v. Bruce Church*, 397 U.S. at 144-45 (regulation designed to effectuate the state's "tenuous interest" in promoting the reputation of Arizona cantaloupes); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928) (statute's real design was to cause "the removal of the packing and canning industries from Mississippi to Louisiana"). Garbage is fundamentally different from the goods involved in those cases. Unlike shrimp, oysters,

and timber, garbage has a negative economic value and endangers the health and environment. While petitioners characterize garbage as gold, its "value" is created only because it must be disposed of in an environmentally-sound manner.[14] None of the cases cited by petitioners address the power of states and localities to channel wastes for the protection of the community.

In an attempt to avoid the balancing standard, petitioners appear to argue that *Pike* "actually applied the *per se* standard in striking down the statute." Pet. Br. 30 n. 16. Petitioners misunderstand *Pike*. There, the cantaloupe packing requirement exacted a heavy burden. It would cause the respondent to lose its entire 1968 crop valued at $700,000, and to expend some $200,000 to build an in-state packing facility, after already having spent $3,000,000 to develop uncultivated, arid land into a farm. In comparison, the local interest was virtually non-existent. The statute was enacted to promote the reputation of Arizona cantaloupes and would allow other growers to benefit from respondent's superior product. The Court explicitly considered both the benefits and the burden of the state law, and found the burden too great:

> Such an incidental consequence of a regulatory scheme [i.e., the costs to appellee] could perhaps be tolerated if a more compelling state interest were involved. But here the State's interest is minimal at best. . . .

397 U.S. at 146. This weighing of the benefits and burdens of the state law was a deliberate and obvious application of the balancing test expounded in *Pike* itself, and the Court invalidated the law not under any *per se* rule, but rather because the

---

[14] In addition, the regulation in *Toomer* "captured" shrimp caught in the ocean and forced the harvest to come ashore in South Carolina before it could continue in interstate commerce. Clarkstown has no such capture provision; haulers are free to bring non-Clarkstown waste wherever they wish. All the Ordinance requires is that once haulers decide to bring garbage into the town, it be delivered to the environmentally-sound transfer facility.

state's interest was so "tenuous," *id.* at 145, and the statute imposed burdens.[15]

Neither is *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993), persuasive authority. At the outset, the court overlooked the holding in *Maine v. Taylor*, 477 U.S. at 137-38, that a direct restriction of trade does not, by itself, render a law unconstitutional. 985 F.2d at 1385. The court also failed to give sufficient weight to the counties' valid health and safety interests in the ordinances at issue. The ordinances, rather than being mere "economic" measures, ensured the responsible and environmentally-sound disposal of local waste in accordance with the federal government's own priorities for disposal methods, *see* EPA *Agenda for Action* at 18-19, and permitted the development of local waste disposal capacity so that the counties could fulfill their traditional responsibilities for solid waste management. Additionally, the court apparently misunderstood both the significant difference between composting and landfilling and the burdens incurred by the county residents. 985 F.2d at 1387-88. Moreover, the officials involved in the litigation did not clearly set forth many benefits achieved by flow control. *Id.* at 1388-89. The Eighth Circuit ignored the genuine problems that local governments face in trying to meet their obligations for waste disposal and mistakenly labeled as "economic protectionism" the counties' attempts to address a very real problem having little to do with profit-making or economic competition.

In analyzing previous cases, this Court has stated that "[w]hat is crucial is [whether the regulation is an] attempt by one State to isolate itself from a problem common to many by

[15] Even if this court were to strike down section 5 as violative of the Commerce Clause, the requirement of section 3 that all garbage originating within the Town be delivered to the transfer facility should be upheld. *Parker v. Brown*, 317 U.S. 341. Courts have upheld town or county flow control regulations. *Filiberto Sanitation*, 857 F.2d 913; *A.A. Mastrangelo, Inc. v. Department of Environmental Protection*, 90 N.J. 666, 449 A.2d 516 (N.J. 1982); *Browning Ferris Industries of Tennessee, Inc. v. Nashville*, 1991 WL 219383 (Tenn. Ct. App. Oct. 30, 1991).

erecting a barrier against the movement of interstate trade." *Philadelphia v. New Jersey*, 437 U.S. at 628; *Baldwin*, 294 U.S. at 527. This case does not implicate such concerns. Clarkstown is not "turning its back" on this problem by attempting to keep an undesirable good out of the town or limit access to disposal sites, *see e.g. Philadelphia v. New Jersey*, nor is it trying to "hoard" a natural resource within the town, *see e.g. Kansas Natural Gas*, 221 U.S. 229; *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). Clarkstown is merely directing *the waste product* of modern society to a centralized location so that the volume of solid waste is reduced, energy is conserved, and the environment less burdened.

CONCLUSION

Petitioners' claim is essentially that their New York based operation is less profitable as a result of Clarkstown's transfer station and ordinance. However, "[t]he Commerce Clause . . . does not elevate free trade above all other values," *Maine v. Taylor*, 477 U.S. at 151, nor have courts "ascribe[d] to the thesis that [a hauler] is constitutionally entitled to the least expensive interim solution to this pervasive waste disposal problem under the guise of Commerce Clause protection." *In re Waste Agreement*, 568 A.2d at 555. In light of garbage's potential hazards and negative value and in contrast to various states' attempts to ban the *importation* of garbage, flow control regulations will not foster parochial "jealousies and aggressions" among the states of the type that motivated the grant of the commerce power to Congress.[16]

Petitioners' claim would jeopardize recycling and resource recovery programs across the country as well as programs to reduce and safely dispose of solid and hazardous waste and

[16] Ferrand, Records of the Federal Convention, Vol. II, p. 308; Vol. III, pp. 478, 547, 548; *see* S. 2877, 102d Cong., 2d Sess. (1992) (legislation introduced by Senators Coats and Baucus to curtail importation of garbage).

would also shackle state and local governments in their efforts to protect the health and environment of their communities.

For all the foregoing reasons, the judgment of the New York Supreme Court, Appellate Division, Second Department, should be affirmed.

Dated: New York, New York
August 19, 1992

Respectfully submitted

Attorneys for Amici Curiae

ROBERT ABRAMS,
Attorney General of the State of New York
JERRY BOONE,
Solicitor General
ANDREA GREEN,
Deputy Solicitor General
JOHN J. SIPOS,*
GORDON J. JOHNSON,
Assistant Attorneys General
PAUL LLEWELLYN, *Legal Intern*
120 Broadway
New York, New York 10271
(212) 416-8473

Attorneys for the State of New York

* *Counsel of Record*

O. PETER SHERWOOD,
Corporation Counsel of the City of New York
LEONARD J. KOERNER,
Chief Assistant Corporation Counsel
ELIZABETH ST. CLAIR,
HILARY BREST,
MARJORIE FOX,
ROBERT ORLIN,
Assistant Corporation Counsel
100 Church Street
New York, New York 10007

Attorneys for the City of New York

JONATHAN WOOD,
Assistant County Attorney
Tompkins County Attorney Office
125 East Court Street
Ithaca, New York 14850
MARTIN GOLD
LOUIS A. EVANS
Brown & Wood
One World Trade Center
New York, New York 10048

Attorneys for the New York State Association of County Attorneys

(15)

No. 92-1402

Supreme Court
AUG 23 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

---

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

D. BRUCE LA PIERRE
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
St. Louis, MO 63130
(314) 935-6477

RICHARD RUDA *
Chief Counsel
LEE FENNELL
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* *Counsel of Record for the Amici Curiae*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether an ordinance that imposes identical requirements for processing in-town and out-of-state solid wastes is consistent with the Commerce Clause.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	2
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	6
THE CLARKSTOWN ORDINANCE IS A VALID MEANS OF IMPROVING DISPOSAL OF MUNICIPAL SOLID WASTE BECAUSE IT DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE AND BECAUSE IT IMPOSES AT MOST ONLY AN INCIDENTAL BURDEN ON COMMERCE	6
A. The Validity Of The Clarkstown Ordinance Under The Dormant Commerce Clause Turns On A Careful Assessment Of The Burdens Imposed On In-Town And Out-Of-State Interests	6
B. Petitioners' Objections To The Clarkstown Ordinance Raise Only The Narrow Question Whether The Requirements For Processing In-Town Solid Waste May Also Be Applied To Processing Out-Of-State Solid Waste	9
C. The Evenhanded Requirement That Both In-Town And Out-Of-State Solid Waste Be Processed At A Particular Transfer Station Serves The Town's Legitimate Interest In Improving Solid Waste Disposal And This Interest Outweighs The Entirely Speculative Burden Imposed On Interstate Commerce	11

TABLE OF CONTENTS—Continued

	Page
1. The Clarkstown Ordinance Does Not Have The Purpose Or Effect Of Economic Protectionism Because It Substantially Increases Waste Disposal Costs For Clarkstown Residents And Businesses	13
2. The Clarkstown Ordinance Is Not Discriminatory Because It Evenhandedly Imposes The Same Requirements On In-Town And Out-Of-State Solid Wastes	16
3. The Incidental Burden Imposed On Interstate Commerce By The Clarkstown Ordinance Is At Most Speculative And Is Outweighed By The Town's Legitimate Interest In Improving Solid Waste Disposal	18
4. This Court Should Not Sit As A Superlegislature To Review Alternative Means Of Providing For The Construction And Operation Of Solid Waste Management Facilities	20
D. The Clarkstown Ordinance Is Consistent With Both The National Policy That States And Local Governments Should Assume Responsibility For Their Own Solid Wastes And The Basic Principle That "Our Economic Unit Is The Nation"	23
CONCLUSION	26

TABLE OF AUTHORITIES

CASES

	Page
Chemical Waste Management, Inc. v. Hunt, 112 S.Ct. 2009 (1992)	6-7, 11
CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987)	20
Exxon Corp. v. Governor of Md., 437 U.S. 117 (1978)	18
Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 112 S.Ct. 2019 (1992)	8, 11, 25
H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525 (1949)	6, 23
Harvey & Harvey, Inc. v. Delaware Solid Waste Auth., 600 F. Supp. 1369 (D. Del. 1985)	12
Henneford v. Silas Mason Co., 300 U.S. 577 (1937)	11
Hughes v. Oklahoma, 441 U.S. 322 (1979)	9, 16, 23, 24
Hybud Equipment Corp. v. City of Akron, Ohio, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985)	12
In re Long Term Out-of-State Disposal Agreement Between the County of Hunterdon and Glendon Energy Co. of Glendon, Pa., 568 A.2d 547 (N.J. Super. Ct. App. Div.) *cert. denied*, 583 A.2d 337 (N.J. 1990)	12
J. Filiberto Sanitation, Inc. v. New Jersey Dep't Environmental Protection, 857 F.2d 913 (3d Cir. 1988)	12
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981)	8, 20
Maine v. Taylor, 477 U.S. 131 (1986)	7, 20
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)	7-8, 8, 17-18
Philadelphia v. New Jersey, 437 U.S. 617 (1978)	7, 16, 24, 25
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	7, 20, 24
Raymond Motor Transp. Inc. v. Rice, 434 U.S. 429 (1978)	8, 20

TABLE OF AUTHORITIES—Continued

	Page
South Carolina Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938)	7, 8
Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945)	7, 8, 21
Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I.), *aff'd per curiam*, 947 F.2d 1004 (1st Cir. 1991)	4, 12
Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth., 814 F. Supp. 1566 (M.D. Ala. 1993)	12
Waste Systems Corp. v. County of Martin, Minn., 985 F.2d 1381 (8th Cir. 1993)	12
Willson v. Black-bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829)	6
Wyoming v. Oklahoma, 112 S.Ct. 789 (1992)	7, 18

STATUTES

Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*	23
Clarkstown, N.Y., Local Laws 1990, No. 9	9

OTHER AUTHORITIES

Bergen County Utility Auth., *Tariff for Transfer Station Service Within the County of Bergen, New Jersey* (Doc. No. SE91020186) (Aug. 16, 1991)	19
C. Baird Brown & Charles S. Henck, *Structuring Municipal Solid Waste Financings, in* ALI-ABA, *Municipal Solid Waste : Disposal Strategies, Environmental Regulations, Contracts and Financing* (1992)	3
Geoffrey A. Campbell, "Supreme Court's Town Law Review May Pose Threat to Waste Bonds," *The Bond Buyer*, May 25, 1993	4
City of Springfield, Missouri, *In My Backyard: Responsible Solid Waste Solutions* (not dated)	5

TABLE OF AUTHORITIES—Continued

	Page
Robert McKinstry, Jr. & C. Baird Brown, *A Checklist For Legally Enforceable Obligations To Use Disposal Services, in* ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulations, Contracts and Financing* (1992)	4
Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 Minn. L. Rev. 1219 (1992)	2-3, 4, 23
Mark Ryan, *Courts Complicate Solid Waste Financings*, Standard & Poor's Creditweek Municipal (1992)	21
Solid Waste Digest, *Solid Waste Price Index* vi (Northeast/June 1993)	19
United States Environmental Protection Agency, *Public Meetings on Municipal Solid Waste Flow Control*, 58 Fed. Reg. 37477 (1993)	3, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1402

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

---

BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AND THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. They have

a special responsibility to ensure that States and local governments have adequate authority to resolve the complex environmental problems of municipal solid waste disposal. In order to replace an environmentally unsatisfactory landfill with a modern waste transfer station, Clarkstown took the responsible but politically difficult step of increasing the costs of solid waste disposal for its residents. Reversal of the judgment below would hobble Clarkstown, hundreds of other local governments, and many States in their efforts to take responsibility for processing and disposing of their own solid wastes. *Amici* accordingly submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT

Amici adopt respondent's statement of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. In recent years, States, counties, and municipalities have undertaken the planning, construction, and operation of modern solid waste management facilities to replace old and often environmentally inadequate facilities such as landfills. The establishment of new local facilities (for example, transfer stations, recycling centers, compost plants, and waste-to-energy incinerators) is particularly remarkable because it indicates a significant change in the "first law of garbage"—that no one wants to take responsibility for the garbage they generate. State and local governments are now more willing to take responsibility for their own solid wastes and reduce reliance on their distant neighbors. State laws authorizing local regulation of solid waste flow are a critical component of this new approach. *See* Ann R. Mesnikoff, Note, *Disposing of*

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

the Dormant Commerce Clause Barrier: Keeping Waste at Home, 76 Minn. L. Rev. 1219, 1230-33, 1242-49 (1992).

Modern solid waste management facilities are expensive, and financing for these facilities is a necessary component of any comprehensive plan to remedy waste disposal problems. Local governments may ensure the necessary financing in any one of three ways, each of which results in their constituents bearing the principal financial burden: by levying taxes on their constituents, by imposing special assessments on property owners and waste generators, or by enacting any one of a wide variety of provisions often labeled "flow control laws." *See* C. Baird Brown & Charles S. Henck, *Structuring Municipal Solid Waste Financings, in* ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulations, Contracts and Financing* 21-29 (1992). Flow controls are defined broadly as "legal provisions . . . to designate where MSW [municipal solid waste] from a specified geographic area must be processed, stored, or disposed." United States Environmental Protection Agency, *Public Meetings on Municipal Solid Waste Flow Control*, 58 Fed. Reg. 37,477, 37,478 (1993). Although solid waste management facilities may be financed directly through taxes and special assessments, some form of flow control is usually necessary where the facility is to be financed indirectly by residential and business payments to trash haulers who in turn pay tipping fees at the facility. *See* Brown & Henck at 23-25.

Flow controls play an important role in the efforts of many state and local governments to reduce solid waste disposal problems and to assume responsibility for waste disposal in their own backyards. More than half of the States have authorized counties and towns to exercise some form of control over the flow of municipal solid waste, and hundreds of local jurisdictions have solid waste

management plans that include flow control ordinances.[2] *See* 58 Fed. Reg. at 37,478. As the EPA has noted, "[f]low control has become a widely relied upon tool to cover the costs of existing facilities and may be a prerequisite to obtain financing for new facilities in many circumstances." 58 Fed. Reg. at 37,478; *see* Note, 76 Minn. L. Rev. at 1225-26 & n.28, 1241 & n.107 (communities may be unable or unwilling to take responsibility for solid waste disposal without control over waste flow); Geoffrey A. Campbell, "Supreme Court's Town Law Review May Pose Threat to Waste Bonds," *The Bond Buyer*, May 25, 1993 at 1.

2. The Clarkstown ordinance at issue in this case is just one example of the great variety of state and local laws subsumed under the flow control rubric. *See* 58 Fed. Reg. at 37,478 (noting "wide variation in the specific circumstances of flow controls from one locality to the next"); Robert B. McKinstry, Jr. & C. Baird Brown, *A Checklist For Legally Enforceable Obligations To Use Disposal Services, in* ALI-ABA, *Municipal Solid Waste: Disposal Strategies, Environmental Regulations, Contracts and Financing* 379-83 (1992) (variety of means employed by local governments to ensure delivery of solid wastes to designated facilities). This ordinance and the provisions for construction and operation of a solid waste transfer station are the basic elements of the remedial plan adopted by Clarkstown under a consent decree with the New York Department of Environmental Conservation.

By establishing a transfer station to replace an environmentally deficient landfill and by imposing the costs of this facility on its own residents and businesses through the ordinance, Clarkstown has taken politically difficult

[2] At least one small State, Rhode Island, has sought to enact flow control legislation on a state-wide basis. *See Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*, 770 F.Supp. 775 (D.R.I.), *aff'd per curiam*, 947 F.2d 1004 (1st Cir. 1991).

steps to improve solid waste disposal. The critical considerations in this case, which petitioners completely overlook, are that the establishment of the transfer station substantially increased the costs of solid waste disposal in Clarkstown, and that the ordinance ensures that these costs fall primarily on Clarkstown residents and businesses. Clarkstown, directly contrary to petitioners' claims, has not attempted to confer an economic benefit on local interests. Quite the contrary, the ordinance, coupled with the provisions for establishing the transfer station, has the effect of imposing substantially higher solid waste disposal costs on Clarkstown residents and businesses.

This adverse economic impact of flow control provisions on local constituents is the general rule. When a local government undertakes the construction and operation of expensive new waste processing or disposal facilities, flow control provisions are often included in solid waste management plans, and they have the effect of imposing the increased costs of financing the facility on that local government's constituency.[3] *See* Pet. Br. 32-33; Brief of National Solid Wastes Management Association as *Amicus Curiae* in Support of Petitioners 7, 10 (both citing increased costs of solid waste facilities imposed on local constituents by flow control provisions).

Clarkstown's solid waste management provisions are designed to remedy significant environmental problems.

[3] For example, voters in the City of Springfield, Missouri decided to establish a materials recovery facility as a means to take responsibility for disposing of their own trash and to reduce the need to export trash to other States and communities. Although construction of this new solid waste management facility will require an increase in tipping fees for trash haulers from $17.50 per ton to approximately $41.00 per ton and a corresponding increase of $3 to $4 per month in the average residential trash bill, the electorate also decided to impose these costs on themselves by approving a flow control provision. *See* City of Springfield, Missouri, *In My Backyard: Responsible Solid Waste Solutions* (not dated).

Under the ordinance at issue in this case, the costs of achieving this legitimate end are borne primarily by Clarkstown residents and businesses who must pay substantially higher fees for waste disposal at the designated transfer station than they would otherwise have to pay. The ordinance is not discriminatory because it applies evenhandedly to wastes generated in-town and wastes generated out-of-state and brought into the Town. Any burden imposed on interstate commerce is at most speculative. There is no reason why this Court should interfere with Clarkstown's efforts to take greater local responsibility for processing local solid wastes.

ARGUMENT

THE CLARKSTOWN ORDINANCE IS A VALID MEANS OF IMPROVING DISPOSAL OF MUNICIPAL SOLID WASTE BECAUSE IT DOES NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE AND BECAUSE IT IMPOSES AT MOST ONLY AN INCIDENTAL BURDEN ON COMMERCE

A. The Validity Of The Clarkstown Ordinance Under The Dormant Commerce Clause Turns On A Careful Assessment Of The Burdens Imposed On In-Town And Out-Of-State Interests

This Court has long recognized that the dormant commerce clause imposes limits on state legislative power in the interest of promoting a national economic union. *H. P. Hood & Sons, Inc., v. Du Mond,* 336 U.S. 525, 537-39 (1949); *Willson v. Black-bird Creek Marsh Co.,* 27 U.S. (2 Pet.) 245, 252 (1829). In determining these limits, the Court draws a fundamental distinction between state laws that evenhandedly burden in-state and out-of-state interests, and state laws that discriminate against interstate commerce. State laws are said to be "discriminatory" where there is little or no burden on in-state interests that corresponds to any burden imposed on out-of-state interests. *See, e.g., Chemical Waste Management,*

Inc. v. Hunt, 112 S.Ct. 2009, 2014 & n.5 (1992); *Wyoming v. Oklahoma,* 112 S.Ct. 789, 800 & n.12 (1992); *Maine v. Taylor,* 477 U.S. 131, 138 (1986).

As a general rule, state laws that burden interstate commerce are valid if they serve legitimate state interests and if the burdens incidentally imposed on interstate commerce are not "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970). State laws that discriminate against interstate commerce, however, are subject to a more demanding level of scrutiny and are invalid "unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma,* 112 S.Ct. at 800. Moreover, "when the state statute amounts to simple economic protectionism," this Court has applied "a 'virtually *per se* rule of invalidity.' " *Id.* (quoting *Philadelphia v. New Jersey,* 437 U.S. 617, 624 (1973)).

Justice (later Chief Justice) Stone made the original distinction between state laws that burden or discriminate against interstate commerce. His justification of different levels of judicial scrutiny turned on an assessment of the operation of state political processes and in particular on a careful analysis of the relative burdens imposed on in-state and out-of-state interests. *See Southern Pacific Co. v. Arizona,* 325 U.S. 761, 767 n.2 (1945); *South Carolina Highway Dep't v. Barnwell Bros., Inc.,* 303 U.S. 177, 184 n.2, 187 (1938). These fundamental inquiries continue to guide this Court's analysis of dormant commerce clause issues.

On the one hand, if a statute imposes similar burdens on both in-state interests and out-of-state interests, there is a political safeguard against legislative overreaching. As this Court has recognized, "[t]he existence of major in-state interests adversely affected by [a state statute] is a powerful safeguard against legislative abuse." *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 473

n.17 (1981). State legislators balance the burdens imposed on one set of their constituents against the benefits conferred on another set of constituents, and out-of-state interests are accorded the same protection from unduly burdensome regulations as in-state interests. *See Raymond Motor Transp. Inc. v. Rice,* 434 U.S. 429, 444 n.18 (1978).

On the other hand, to the extent that statutory burdens fall primarily on out-of-state interests, legislators are not subject to the same political restraints normally exerted when they impose similar burdens on their own constituents. *See Southern Pacific,* 325 U.S. at 767 n.2; *South Carolina Highway Dep't,* 303 U.S. at 184 n.2. Given this understanding of state political processes, the Court has recognized that it is appropriate to defer to state legislative policies that evenhandedly burden in-state and out-of-state interests and, conversely, that less deference should be given to legislative judgments imposing disproportionate burdens on out-of-state interests. *Compare Clover Leaf Creamery,* 449 U.S. at 472-73 (deference to state environmental regulations imposing burdens on both in-state and out-of-state interests) *with Kassel v. Consolidated Freightways Corp.,* 450 U.S. 662, 675-76 (1981) (Powell, J., plurality opinion) and *Raymond Motor,* 434 U.S. at 444-46 & n.18 (both rejecting traditional presumption of validity of state highway safety laws that disproportionately burdened out-of-state interests).

The restraints imposed on state laws by the dormant commerce clause also apply to local laws. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources,* 112 S. Ct. 2019 (1992). The party challenging an ordinance bears the burden of showing either that the local provision discriminates against interstate commerce by favoring local interests at the expense of out-of-state interests, or that the local provision imposes a burden on interstate commerce that is clearly

excessive in light of the local benefits. *See Hughes v. Oklahoma,* 441 U.S. 332, 336 (1979). As we demonstrate below, the state courts correctly found that petitioners completely failed to make any showing that the Clarkstown ordinance either discriminates against interstate commerce or imposes an impermissible burden on interstate commerce. Pet. App. 11a-12a, 19a-20a, 28a-31a.

B. Petitioners' Objections To The Clarkstown Ordinance Raise Only The Narrow Question Whether The Requirements For Processing In-Town Solid Waste May Also Be Applied To Processing Out-Of-State Solid Waste

The Clarkstown ordinance, as interpreted by the New York state courts, provides that (1) all acceptable solid waste generated within the Town, or generated outside and brought into the Town, must be processed at the Town transfer station or at a Town-approved recycling station, and that (2) the non-recyclable "residue" of any waste sorted at a recycling center must then be processed at the Town transfer station. Pet. App. 2a, 5a-6a, 24a-25a. The Appellate Division of the New York Supreme Court specifically determined that the provisions of § 3 applicable to in-town waste are identical to the provisions of § 5 applicable to waste generated outside Clarkstown. Pet. 5a-6a. Petitioners object to the ordinance only as applied to their activity as solid waste processors.[4]

---

[4] Although the case does not raise any question about the effects of the ordinance on solid waste generators, trash collectors, or final disposal facilities, the ordinance applies just as evenhandedly to all of these activities as it does to waste processing. For example, the ordinance applies evenhandedly to all trash collectors, whether in-town, out-of-town, or out-of-state: no one may cart Clarkstown trash out-of-town, and all are free to bring non-Clarkstown trash to the Town transfer station. There is no evidence to suggest that the neutrally worded rules apply in a discriminatory fashion to favor in-town trash collectors or that the rules impose any burden on out-of-town trash collectors.

Similarly, all waste generators—regardless of their location—are free to use the Town transfer station, and the tipping fee paid

Petitioners maintain that they operate a recycling center, and they acknowledge that under the ordinance they may operate their facility to receive solid waste, sort out recyclable materials, and ship the recyclable materials out of town. Pet. Br. at 5 & n.3, 6. As solid waste processors, they challenge the ordinance on the narrow ground that they are required to take the "residue" (the non-recyclable component of the solid waste brought to their recycling center) to the Town transfer station for shipment to out-of-state disposal facilities instead of shipping the residue themselves to out-of-state disposal facilities. Pet. Br. 6.

Although petitioners never established the precise nature of their business, *see* Pet. App. 18a, a fair reading of the record indicates that petitioners challenge the ordinance only as applied to trash generated outside Clarkstown and brought to their facility from other parts of New York or from out of state, and that they do not challenge the ordinance as applied to solid waste generated in Clarkstown. Throughout the litigation below, petitioners repeatedly denied that they dealt in Clarkstown solid waste and claimed that the wastes processed at their recycling center came exclusively from outside Clarkstown. *See, e.g.*, R. at 81, 310, 332. In a parallel proceeding in federal district court initiated by petitioners, petitioners did not dispute that the Clarkstown ordinance was valid as applied to solid waste generated in the Town. Pet. App. 43a n.2. Moreover, as a factual matter "there is very little recyclable material in the acceptable solid waste generated" in Clarkstown, J.A. 10-11; thus, there would have been little reason for petitioners to bring Clarkstown solid waste to their facility (unless, contrary to their representations, *see* Pet. Br. 5 n.3, they were operating it simply as a transfer station to bale solid waste for out-of-state shipment).

In short, on this record, the case does not raise any question of Clarkstown's authority under § 3 of the ordinance to require that solid waste generated within the Town be processed at a particular facility. Instead, the case raises only the more limited question whether, under § 5, Clarkstown may impose the same rules for processing waste generated within the Town on waste generated outside Clarkstown and brought into the Town.

C. The Evenhanded Requirement That Both In-Town And Out-Of-State Solid Waste Be Processed At A Particular Transfer Station Serves The Town's Legitimate Interest In Improving Solid Waste Disposal And This Interest Outweighs The Entirely Speculative Burden Imposed On Interstate Commerce

Petitioners attack the Clarkstown ordinance principally by labeling it an "export ban" which, they assert, presents the "flip side" of the import restrictions disapproved in *Chemical Waste Management*, *supra*, and *Fort Gratiot*, *supra*. Catchwords and labels, however, are not a substitute for analysis of the actual burdens imposed on in-town and out-of-town interests by Clarkstown's provisions for processing solid waste. *See Henneford v. Silas Mason Co.*, 300 U.S. 577, 586 (1937). Thus, most courts have correctly recognized that careful comparison of the burdens imposed on local interests and out-

---

by trash haulers and passed on to waste generators is exactly the same regardless of the source of the waste. Although Clarkstown waste cannot be sent out of town, this aspect of the ordinance has no effect on out-of-town waste generators, and the burden on waste generators, if any, falls exclusively on Clarkstown residents and businesses.

Finally, with regard to landfills and other final disposal facilities, the requirement that solid wastes must be processed at the town transfer station neither discriminates against interstate commerce nor burdens that commerce. Prior to the completion of the transfer station, Clarkstown's solid wastes were deposited in-town at the town landfill. R. 251. Since the landfill was closed and the transfer station was opened, all wastes have been shipped out-of-state for final disposal. *See* Pet. App. 3a-4a, 30a. There can be no discrimination against out-of-state final disposal facilities simply because there is no in-town disposal facility that can be favored. There is also no burden on interstate commerce because all wastes are ultimately shipped in interstate commerce to out-of-state facilities. *See id.* at 30a.

of-state interests is the key to determining the validity of waste flow regulations.[5]

Petitioners cannot carry their burden of demonstrating that Clarkstown has a purpose of protecting local economic interests for the simple reason that the ordinance substantially increases solid waste disposal costs for Clarkstown residents. Similarly, petitioners cannot demonstrate that the ordinance discriminates against interstate

[5] For example, in a closely analogous case, the Third Circuit recognized that the "essential question" was whether a New Jersey flow control provision conferred an economic advantage on in-state economic interests; the court upheld the regulation because it in fact placed "the burden of alleviating the trash problem" on New Jersey residents. *J. Filiberto Sanitation, Inc. v. New Jersey Dep't Environmental Protection*, 857 F.2d 913, 919, 921-22 (3d Cir. 1988). Similarly, other courts have upheld the power of States and local governments to regulate the flow of municipal solid waste after considering the costs imposed on local interests. *See, e.g., Hybud Equipment Corp. v. City of Akron, Ohio*, 654 F.2d 1187, 1194 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985); *Harvey & Harvey, Inc. v. Delaware Solid Waste Authority*, 600 F. Supp. 1369, 1379, 1380 & n.15 (D. Del. 1985); *In re Long-Term Out-Of-State Waste Disposal Agreement between the County of Hunterdon and Glendon Energy Co. of Glendon, Pa.*, 568 A.2d 547, 554-55 (N.J. Super. Ct. App. Div.), *cert. denied*, 583 A.2d 337 (N.J. 1990).

In one case holding a flow control provision invalid under the dormant commerce clause, the court recognized the central importance of evaluating the allocation of burdens between local interests and out-of-state interests, but it found that the regulation conferred a benefit on local interests at the expense of out-of-state interests. *See Stephen D. DeVito, Jr. Trucking, Inc. v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775, 782-83 (D.R.I.), *aff'd per curiam*, 947 F.2d 1004 (1st Cir. 1991). In two other cases invalidating flow control provisions, either the court failed to give careful consideration to the burdens of financing waste management facilities imposed on local interests, *see Waste Systems Corp. v. County of Martin, Minn.*, 985 F.2d 1381, 1386-87 (8th Cir. 1993), or the record ignored this critical issue. *See Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Auth.*, 814 F. Supp. 1566 (M.D. Ala. 1993).

commerce because it applies evenhandedly to all solid waste whether generated in Clarkstown or out-of-state and because it does not favor any in-town interest at the expense of analogous out-of-state interests. Finally, the contention that the Clarkstown ordinance imposes an impermissible burden on interstate commerce confuses adverse effects on petitioners' business with burdens imposed on interstate commerce.

1. *The Clarkstown Ordinance Does Not Have The Purpose Or Effect Of Economic Protectionism Because It Substantially Increases Waste Disposal Costs For Clarkstown Residents And Businesses*

Petitioners construe the Clarkstown requirement that solid waste be processed at a designated transfer station as an attempt to hoard trash and capture the fees for its disposal. Pet. Br. 10. More particularly, in light of the town's contract with the private operator of the designated transfer station, petitioners contend that the Town's purpose is to protect this contractor from competition and to reduce the chances that the Town will have to make direct payments to the contractor if an insufficient supply of solid waste is delivered to the transfer station. Pet. Br. 4-5, 11-12.

Petitioners' economic protectionism argument has a fatal flaw. Instead of garnering a local economic benefit, Clarkstown in fact has imposed a substantial financial burden on its residents and businesses. The Town's provisions for closing its landfill and establishing in its place a transfer station charging a tipping fee of $81 per ton, coupled with the requirement that in-town solid waste must be processed at this facility, have the effect of substantially increasing the costs of solid waste disposal for Clarkstown residents and businesses.

Immediately prior to the opening of the transfer station in January 1991, solid wastes collected in Clarkstown had been deposited at the Town's landfill. *See* R. 126-28,

251. Although the record does not establish the tipping fees at the landfill in its last month of operation in December 1990, the low level of these fees is suggested by the fact that in 1987, just three years earlier, the Clarkstown landfill's tipping fee was as low as $6 per ton. *See* R. 249, 258. The transfer station's $81 per ton tipping fee was a substantial increase over the tipping fees previously charged by the landfill, and it seems inescapable that private haulers passed on the costs of these higher tipping fees in the form of rate increases to their residential and business customers in Clarkstown.

Indeed, looking simply at the $70 per ton tipping fee charged at petitioners' facility, it is clear that the $81 per ton tipping fee at the Town's designated transfer station raises solid waste disposal costs for Clarkstown waste generators. If the Town had simply closed the municipal landfill, Clarkstown residents, at least in theory, could have sent their solid waste to petitioners' facility at a cost per ton that would have been fifteen percent lower than the tipping fee at the designated transfer station. *See* Pet. Br. 32. Thus, petitioners' argument that Clarkstown is hoarding solid waste because it is a revenue-generating resource, *id.* at 15, ignores the critical fact that the revenue comes from Clarkstown residents and businesses who, but for the establishment of the transfer station and the requirements of the ordinance, would enjoy lower solid waste disposal costs. In the absence of any showing of economic protectionism, there is no merit to petitioners' contention, *id.* at 15-29, that the Clarkstown ordinance is *per se* invalid.

Far from attempting to protect local economic interests, Clarkstown took the politically difficult step of increasing its constituents' solid waste disposal costs as part of a comprehensive and responsible plan to resolve environmental problems at its municipal landfill. As the state appellate court found, Clarkstown entered into a consent decree with the New York Department of Environmental

Conservation, agreed to close the municipal landfill, and further agreed to implement a remedial plan "which would address the adverse environmental consequences caused by the landfill and by its closing." Pet. App. 3a. The state court determined that this remedial plan included both (1) the Town's provisions for a private party to construct and operate a transfer station charging a tipping fee of $81 per ton, and (2) the provisions of the ordinance requiring delivery of solid waste to this transfer station.[6] Pet. App. 4a-6a.

Both the transfer station and flow control are designed to promote Clarkstown's legitimate environmental interest in improving solid waste disposal. As the state court found, the Town's concern with the "continued economic viability" of its new solid waste management facility established under the remedial plan "does not negate or detract from, but in fact is a part of the health, safety, and environmental concerns such plan is designed to address." Pet. App. 10a (citations omitted).[7] This finding is unimpeachable because the costs of the "continued economic viability" of the transfer station fall primarily on the residents and businesses of Clarkstown. Contrary to petitioners' arguments, Pet. Br. 11, 34, Clarkstown has not attempted to shift the cost of financing the transfer station from its residents and businesses to citizens of other jurisdictions. The costs of improving solid waste disposal are borne by out-of-town waste generators on exactly the same terms as in-town waste generators and only to the

[6] The state court also found that an amendment to the Town's zoning code was part of the remedial plan. Pet. App. 4a-5a. Petitioners did not challenge this third component of the remedial plan. *See* Pet. Br. 5 n.3.

[7] In analyzing the Town's remedial goals, petitioners artfully attempt to separate the flow control ordinance from the transfer station, and to attribute the Town's environmental purpose solely to the transfer station. *See* Pet. Br. 31. Given the state court's explicit finding, their argument has no merit.

extent that out-of-town waste generators choose to take advantage of the improved waste disposal facilities in Clarkstown. In these circumstances, there is no reason to retreat from the proposition that state and local governments have "every right to protect [their] residents' pocketbooks as well as their environment." *Philadelphia v. New Jersey*, 437 U.S. at 626.

2. *The Clarkstown Ordinance Is Not Discriminatory Because It Evenhandedly Imposes The Same Requirements On In-Town And Out-Of-State Solid Wastes*

In order to carry their burden of showing that the Clarkstown ordinance discriminates against interstate commerce, petitioners must show that the ordinance treats in-town and out-of-state solid wastes differently solely on the basis of the origin of the wastes or that it imposes some burden on out-of-state interests without imposing a corresponding burden on in-town interests. *See Hughes*, 441 U.S. at 336. Petitioners cannot show that the ordinance discriminates either on the basis of the geographic origin of the solid waste that they process or on the basis of the geographic location of waste processing activities.

The state court found, as a matter of state law, that solid waste generated outside of Clarkstown (in other areas of New York or out-of-state) and brought into the Town is regulated under § 5 in exactly the same fashion as solid waste generated in Clarkstown is regulated under § 3.[8] Pet. App. 5a-6a. This finding forecloses

[8] There is another way in which the non-discriminatory effect of the Clarkstown ordinance may be explained. As respondent carefully elaborates in its brief on the merits, petitioners harvest recyclable materials from solid wastes and generate non-recyclable residue. Under the Town's point of origin recycling program, residents of Clarkstown and other businesses in Clarkstown also harvest recyclable materials from the solid wastes that they generate. *See* J.A. 10-11. With respect to these locally generated residues, both petitioner and other Clarkstown interests must deliver them to the Town's transfer station. Thus, the ordinance is non-discriminatory, and the case does not raise any question of discriminatory treatment of wastes generated in-town and out-of-state.

any argument that the ordinance discriminates against interstate commerce on the basis of the origin of the solid waste. Similarly, petitioners cannot show that the ordinance is discriminatory as applied to waste processing activities (like the operation of a recycling center or a transfer station). Petitioners make no showing that Clarkstown imposes different burdens on in-town and out-of-state recycling centers or transfer stations with respect to their dealings in either Clarkstown waste or waste generated outside the Town. *See* Pet. Br. 17-25.

Instead, petitioners simply assert that "[t]he effect of Local Law 9 is to prohibit flatly the export of trash to points outside of Clarkstown unless the trash is first brought to the designated facility for processing." Pet. Br. 18. Petitioners' characterization of the ordinance falls far short of a colorable showing of discrimination against interstate commerce because they do not even suggest that in-town and out-of-state activities or wastes are treated differently. The petitioners' assertion that "the ordinance bans the movement of the nonrecyclable trash from the recycling center directly to out-of-state destinations", Pet. Br. 6, is at most a claim that the ordinance incidentally burdens interstate commerce because both in-town and out-of-town solid wastes must be delivered to the transfer station prior to shipment to out-of-state final disposal facilities.[9]

[9] Although a claim of discrimination against interstate commerce brought by an out-of-state waste processor would present a factually different case, any speculative argument about discrimination in these circumstances would have no merit because, even if a burden on out-of-state waste processors could be established, it would be matched by the burden imposed on Clarkstown residents and businesses who are forced to pay the higher in-town rates for waste disposal. *See Clover Leaf Creamery*, 449 U.S. at 472-73 (balancing

3. *The Incidental Burden Imposed On Interstate Commerce By The Clarkstown Ordinance Is At Most Speculative And Is Outweighted By The Town's Legitimate Interest In Improving Solid Waste Disposal*

As the lower courts found, petitioners have not demonstrated that the Clarkstown ordinance imposes any burden on interstate commerce. Pet. App. 11a-12a, 19a-20a, 28a-31a. In this Court, petitioners argue only that the ordinance "prevent[s] trash from being sent to the most cost-effective disposal facilities, and insulate[s] the designated facility from all price competition." Pet. Br. 32. This argument confuses an adverse effect on petitioners' business with an adverse effect on interstate commerce.

It may well be true that petitioners' facility is cheaper, because the tipping fee is $11 per ton lower than the fee charged at the Town's designated transfer station. The requirement that petitioners take the non-recyclable "residue" of their operations to the Town transfer station for shipment to out-of-state disposal facilities instead of shipping the residue themselves to out-of-state disposal facilities may well increase their cost of doing business and have "the effect of putting petitioners out of business." Pet. Br. 6. Although the price differential may burden petitioners' business, it does not establish any burden on interstate commerce. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-28 (1978) (commerce clause protects the interstate market and not particular firms who participate in that market).

---

benefits conferred on in-state pulpwood producers and burdens imposed on in-state dairies and milk retailers against burdens imposed on out-of-state producers of plastic resins). The burden of higher solid waste disposal costs imposed on Clarkstown interests would negate any inference of economic protectionism. *See Wyoming v. Oklahoma*, 112 S. Ct. at 800 (dormant commerce clause prohibits regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors).

The glaring defect in petitioners' commerce clause argument is that the record is totally devoid of any evidence of the effect of the $81 tipping fee on interstate commerce. Any contention that the $81 tipping fee at the Town's designated transfer station burdens interstate commerce rests on the tacit assumption that the $70 fee charged by petitioners is the market rate and that the $11 fee differential will discourage the flow of solid waste into Clarkstown and then out of Clarkstown. Given a tipping fee of $114.20 per ton at transfer stations in neighboring Bergen County, New Jersey, this assumption may well be wrong. *See* Bergen County Utilities Authority, *Tariff for Transfer Station Service Within the County of Bergen, New Jersey* (Doc. No. SE91020186) (Aug. 16, 1991); *see also* Solid Waste Digest, *Solid Waste Price Index* vi (Northeast/June 1993) ($137.90 per ton tipping fee at BCUA Transfer Station). If $114.20 per ton is the market rate, then the $81 fee would have little if any impact on the flow of trash through Clarkstown because out-of-state solid waste generators and haulers would still prefer the tipping fees in Clarkstown even after an increase to $81 per ton. In any event, on the record below, it is not possible to show any burden on the flow of goods in interstate commerce either into or out of Clarkstown.[10] Petitioners have left the Court to guess-

---

[10] Petitioners are perhaps reluctant to elaborate on the burdens allegedly imposed on the flow of solid waste in interstate commerce into Clarkstown because the trial court found that much of the out-of-state solid waste processed at their facility came from New Jersey in violation of that State's law. Pet. App. 19a, 31a. Similarly, petitioners have not offered any explanation how processing the residue of their recycling operations at the Town transfer station imposes any burden on the flow of solid waste out of Clarkstown. Such a showing is improbable given the unchallenged finding of the state courts that all non-recyclable solid waste is shipped in interstate commerce from Clarkstown to out-of-state disposal facilities. *See* Pet. App. 30a (solid waste is destined for out-of-state facilities whether shipped from Town transfer station or petitioners' facility).

work with respect to the burden, if any, imposed on interstate commerce.

Although the application of the *Pike* balancing test is occasionally difficult, *see CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69, 95-96 (1987) (Scalia, J., concurring in part and concurring in the judgment), there are no problems in applying this test where the scales are weighted only on one side. In cases where the scales are weighted only on the side of the burden imposed on interstate commerce and there is no countervailing proof of a State's legitimate health or safety purpose, the Court readily holds state laws invalid under the dormant commerce clause. *See Kassel,* 450 U.S. at 675, 678-79 (Powell, J., plurality opinion); *Raymond Motor,* 434 U.S. at 447. In this case, where the balance is weighted only on the side of the Town's legitimate environmental interest in improving solid waste disposal and there is no countervailing showing of any burden on interstate commerce, the Court should just as readily sustain the Town's ordinance.

4. *This Court Should Not Sit As A Superlegislature To Review Alternative Means Of Providing For The Construction And Operation Of Solid Waste Management Facilities*

In the absence of any showing that the Clarkstown ordinance either discriminates against or burdens interstate commerce, there is no occasion to address the question whether there are alternative means that the Town should have employed to achieve its legitimate end of improving solid waste disposal. *See Maine v. Taylor,* 477 U.S. at 138 (if a statute is shown to be discriminatory, State has burden of showing that its purpose could not be served as well by other non-discriminatory means); *Pike,* 397 U.S. at 142 (if statute is shown to burden interstate commerce, courts will consider whether state interest could be promoted as well by other less burdensome means). Nonetheless, petitioners urge this Court to

explore alternative means of providing for the construction and operation of modern solid waste disposal facilities and to substitute one of these alternatives for the approach taken by Clarkstown in its remedial plan. Pet. Br. 27-29, 36-37. The Court should decline petitioners' invitation to sit, in Justice Black's apt phrase, as a "super-legislature." *See Southern Pacific,* 325 U.S. at 788 (Black, J., dissenting).

Petitioners' discussion of alternatives to the Clarkstown remedial plan begins with the assertion that it is not "impossible to finance [a waste disposal project] without a flow control law." Pet. Br. 28 (citing Mark Ryan, *Courts Complicate Solid Waste Financings,* Standard & Poor's Creditweek Municipal at 69, 70 (Nov. 9, 1992)). This assertion is true only in the general sense—made clear by a full reading of the article cited by petitioners—that a public subsidy is not always necessary to ensure the successful construction and operation of modern solid waste facilities. *See* Ryan, *Courts Complicate Solid Waste Financings.* This same article, however, also indicates that some form of guaranteed public support like special assessments on property owners or control over waste flow is often necessary to maintain the financial integrity of solid waste management facilities. *See id.* at 70.

In this case, Clarkstown determined that control over waste flow was necessary to provide for the construction and operation of a transfer station. Petitioners, however, urge the Court to require Clarkstown to use special assessments or local taxes instead. Pet. Br. 29. But taxes or special assessments on property owners and control over waste flow are merely different forms of public subsidies,[11]

---

[11] Taxes or special assessments on property owners are direct means of requiring local financial support for waste management facilities. Control over flow of wastes from property owners is an indirect means of ensuring local financial support for a waste disposal facility. Residents and businesses in Clarkstown, for example, must send their solid wastes to a designated solid waste facility and pay higher fees than they would otherwise have to pay.

and the question in this case is whether the Court should second-guess Clarkstown's decision about the form of public subsidy that is appropriate to provide for the construction and operation of the transfer station.

Amici submit that where, as here, the burdens of guaranteeing public support for the transfer station fall primarily on Clarkstown interests, there is no need for the Court to consider alternative forms of public support and to second-guess the Town's political determination about the best means of improving solid waste disposal. This burden on local interests ensures that local decisionmakers have carefully evaluated the costs and benefits of their remedial plan. Moreover, the two alternative forms of public subsidy advanced by the petitioners—taxes and special assessments—are simply alternative means of ensuring that local interests bear the costs of financing waste disposal facilities; petitioners do not even begin to suggest how or why these alternative forms of public subsidy would have a less burdensome impact on interstate commerce than the approach taken by Clarkstown.[12]

Clarkstown responsibly imposed the costs of the transfer station on its citizens by requiring them to use the designated facility even though they might have obtained disposal services elsewhere at lower price. Clarkstown could also have imposed the costs of building and operating the transfer station on its citizens by levying a tax or imposing a special fee on property owners. Petitioners' suggestion that Clarkstown chose to control waste flow because tax levies or utility fees are less politically popu-

[12] Clarkstown also might combine lower tipping fees with increased taxes or special assessments, but these strategies might well result in forcing Clarkstown citizens to subsidize the management of out-of-town wastes. The commerce clause certainly does not require a local government, having taken responsible steps to manage its own wastes, to confer benefits on outside interests in the form of subsidized waste services by disproportionately burdening its own constituents.

lar has no basis in fact. *See* Pet. Br. 36. As the complaints of three Long Island, New York villages illustrate, perhaps unwittingly, the increased costs of financing waste disposal facilities under flow control laws are just as politically sensitive as increased taxes or fees. *See* Brief of Incorporated Village of Westbury *et al.* as *Amici Curiae* in Support of Petitioners. There is, then, simply no warrant for the courts to control state or local government choices among a variety of politically difficult means of financing solid waste disposal.

D. The Clarkstown Ordinance Is Consistent With Both The National Policy That States and Local Governments Should Assume Responsibility For Their Own Solid Wastes and the Basic Principle That "Our Economic Unit Is The Nation"

The Clarkstown ordinance, coupled with the provisions for establishing the new transfer station, promotes the Town's legitimate interest in improving solid waste disposal. The ordinance is consistent with the national policy established by the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, that States and local governments should shoulder responsibility for environmentally sound disposal of solid wastes generated in their jurisdictions. *See* Note, 76 Minn. L. Rev. at 1223-30, 1242-49. It is also consistent with the "basic principle that 'our economic unit is the Nation.'" *Hughes*, 441 U.S. at 339 (quoting *H. P. Hood & Sons*, 336 U.S. at 537 (1949)). In taking greater responsibility for the processing and disposal of local solid wastes, Clarkstown neither discriminates against interstate commerce nor imposes any cognizable burden on interstate commerce. Instead, the burdens of financing the Town's new solid waste management facility fall primarily on Clarkstown residents and businesses.

The imposition of significant financial burdens on local interests distinguishes the Clarkstown ordinance from the prohibitions on exports, local processing requirements, and

import restrictions that this Court has condemned in other cases. In these cases, the state or local laws at issue either did not impose any burden on local interests and imposed burdens exclusively on out-of-state interests or these laws provided benefits solely for local interests. Thus, for example, the export restriction held invalid in *Hughes* imposed burdens exclusively on out-of-state interests and reserved benefits exclusively for in-state interests. All of the burdens of Oklahoma's prohibition on exporting natural minnows fell on individuals who wished to use them as bait for fishing outside of the State, and the benefits of fishing with these minnows were reserved solely for fishing in Oklahoma.[18] *See Hughes,* 441 U.S. at 336-38.

Similarly, in the cases that petitioners collect under the label "local processing" requirements (Pet. Br. 22-23), the laws at issue conferred benefits on local interests and did not impose any burdens on these interests. For example, in *Pike,* an Arizona statute provided that all cantaloupes grown in Arizona had to be packaged in Arizona prior to interstate shipment. 397 U.S. 137. This statute, which the Court held invalid under the dormant commerce clause, was designed to enhance the reputation of Arizona cantaloupe growers, and did not impose any burdens on Arizona interests.

Just as the imposition of significant financial burdens on local interests distinguishes the Clarkstown ordinance from laws condemned as either prohibitions on exports or local processing requirements, the allocation of benefits and burdens between local and out-of-state interests also distinguishes the import restrictions held invalid by this Court in three recent cases. In *Philadelphia v. New Jersey,* 437 U.S. 617, this Court held that a facially discriminatory New Jersey law prohibiting the importation of most forms of solid waste violated the commerce clause. All of the burdens of the state law fell on out-of-state interests that were completely barred from access to New Jersey landfills and no burdens were imposed on New Jersey citizens. *See id.* at 628-29. All of the benefits of conserving scarce landfill space, minimizing pollution problems, and reducing waste disposal costs were reserved for New Jersey citizens. *See id.* Similarly, *Chemical Waste Management* and *Fort Gratiot* invalidated state laws that reserved the benefits of waste disposal sites for in-state interests and did not impose any burdens on in-state interests.

[18] In addition to *Hughes,* petitioners cite several other cases holding export restrictions invalid. Pet. Br. 19-22. These cases are also easily distinguished because the provisions at issue reserved benefits for in-state interests and, in sharp contrast to the Clarkstown ordinance, did not impose any burdens on local interests.

In these cases and others condemning export prohibitions, local processing requirements, and import restrictions, one State attempted to promote its parochial interests at the expense of its sister states and effectively opted out of the interstate market. The Clarkstown ordinance is fundamentally different. Instead of imposing burdens on out-of-state interests, this local law imposes its burdens on local interests. As the Chief Justice has noted, "Commerce Clause concerns are at their nadir" when state or local laws impose burdens on local interests. *Fort Gratiot,* 112 S. Ct. at 2029 (Rehnquist, C.J., dissenting).

There is a substantial risk of disruption of interstate commerce, balkanization, and retaliation when state or local laws protect local economic interests by imposing burdens on out-of-state interests. *See, e.g., Philadelphia v. New Jersey,* 437 U.S. at 629. Provisions like the Clarkstown ordinance that impose burdens on local interests, however, do not create the same risk of disrupting interstate commerce. The danger is not that other communities or States will retaliate because Clarkstown has taken greater responsibility for disposing of its solid wastes; the danger is that other communities, unlike Clarkstown, may not be willing to take the politically difficult step of imposing costs on their constituents in order to improve solid waste disposal.

CONCLUSION

The judgment of the Supreme Court, Appellate Division, Second Department of the State of New York should be affirmed.

Respectfully submitted,

D. BRUCE LA PIERRE
WASHINGTON UNIVERSITY
SCHOOL OF LAW
One Brookings Drive
St. Louis, MO 63130
(314) 935-6477

RICHARD RUDA *
Chief Counsel
LEE FENNELL
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* *Counsel of Record for the*
Amici Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
STATEMENT	4
ARGUMENT	11
I. MUNICIPAL FLOW CONTROL REQUIREMENTS WHICH SUPPORT A MUNICIPALITY'S PROVISION OF SOLID WASTE MANAGEMENT SERVICES ARE NOT SUBJECT TO COMMERCE CLAUSE SCRUTINY	11
A. The Principles Announced in *Philadelphia v. New Jersey* and *Fort Gratiot Landfill* Do Not Apply to Publicly-Owned Facilities	11
B. Municipalities That Provide Solid Waste Management Services To Their Citizens Are Market Participants Exempt From Commerce Clause Scrutiny	15
II. DISPOSITION OF THE INSTANT CASE	24
CONCLUSION	26

TABLE OF AUTHORITIES

CASES	Page
Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992)	12,13
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)	*passim*
Evergreen Waste Systems, Inc. v. Metropolitan Service District, 643 F. Supp. 127 (D. Or. 1986)	25
Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S. Ct. 2019 (1992)	*passim*
Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976)	*passim*
J. Filiberto Sanitation v. Department of Environmental Protection, 857 F. 2d 913 (3d tCir. 1988)	25
LeFrancois v. State, 669 F. Supp. 1204 (D.R.I. 1987)	25
New Energy Co. v. Limbach, 486 U.S. 269 (1988)	13
New York v. United States, 326 U.S. 572 (1946)	17
Oswald v. City of Blue Springs, 635 S.W. 2d 332 (Mo. 1982)	6
Reeves, Inc. v. Stake, 447 U.S. 429 (1980)	*passim*
Shayne Bros. Inc. v. District of Columbia, 592 F. Supp. 1128 (D.D.C. 1984)	25
South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984)	23
Sporhase v. Nebraska, 458 U.S. 941 (1982)	14,23,26
Stephen D. Devito, Jr. Trucking v. Rhode Island Solid Waste Management Corp., 770 F. Supp. 775 (D.R.I.), *preliminary injunction aff'd*, 947 F.2d 1004 (1st Cir. 1991)	25
Swin Resource Systems, Inc. v. Lycoming County, 883 F.2d 245 (3d Cir. 1989)	25

Table of Authorities Continued

	Page
Town of Clarkstown v. C & A Carbone, Inc., 587 N.Y.S.2d 681	9,10
Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority, 814 F. Supp. 1566 (M.D. Ala. 1993)	25
Waste Systems Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993)	*passim*
White v. Massachusetts Council of Construction Employers, Inc. 460 U.S. 204 (1983)	15,21,24
Wyoming v. Oklahoma, 112 S. Ct. 789 (1992)	13
STATUTES	
Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992	13
Missouri Rev. Stat. Supp. Section 260.225.2	2
PERIODICALS AND PUBLICATIONS	
"Up In Smoke—Fading Garbage Crisis Leaves Incinerators Competing for Trash," *Wall Street Journal*, August 11, 1993 at p. 1	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1402

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., AND
ANGELO CARBONE,

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

---

BRIEF OF AMICUS CURIAE CITY OF SPRINGFIELD, MISSOURI IN SUPPORT OF RESPONDENT

Interest of Amicus Curiae[1]

In order to provide for the processing and disposal of household trash generated by its citizens, the City of Springfield, Missouri has adopted an integrated and

---

[1] The parties' letters of consent have been filed with the Clerk pursuant to this Court's Rule 37.3.

comprehensive solid waste management plan, as authorized and directed by the State of Missouri.[2] As part of the Plan, the City of Springfield has long-intended to finance construction of a new state-of-the-art Materials Recovery and Composting Facility (the"Facility") through the issuance of a $17.9 million revenue bond. The integrity of the bond issue is largely dependent on the City's facility having a sure and stable source of revenue, specifically in the form of a guarantee that the City's citizens will process their waste at the City's facility. The City has created that assurance through a "flow control measure" by which the City's citizens have imposed upon themselves the obligation to process *their* waste at *their* facility.

Recent decisions have called into question the constitutionality of "flow control" measures, such as those which are at the core of the City of Springfield's Plan. They make more difficult the ability of the City of Springfield to proceed with the bond issue. Brief of Petitioner at 4-5; *see Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993); *see also* "Up In Smoke—Fading Garbage Crisis Leaves Incinerators Competing for Trash," *Wall Street Journal*, August 11, 1993 at p. 1. The City of Springfield is especially concerned that the uncertainty created by a loosely worded decision of this Court in addressing the approach to solid waste services taken by Respondent Town of Clarkstown will exacerbate the problem. This is particularly true at a time when the garbage disposal problems of towns and cities like

[2] *See* Missouri Rev. Stat. Supp. Section 260.225.2; Brief of Petitioner at 14 n. 8.

the City of Springfield require urgent attention, which traditionally and perhaps best has been provided by City-owned or operated facilities.

As shown below, the ownership and operation of solid waste disposal and treatment facilities by municipalities does not present constitutional difficulty under the Commerce Clause. Such services are made feasible by the requirement that municipal residents have their household trash delivered to a municipal landfill such as the one owned and operated by the City of Springfield, or, once built, to the City's new treatment Facility. This Court's cases have long recognized that a municipality may grant preferences to, and impose burdens on, its citizens in connection with its *own* provision of services to those same citizens. Those preferences and burdens which citizens of a town effectively impose upon themselves in order to support their own collective enterprise are not the sort of discrimination forbidden by the Commerce Clause. And the City's ability to continue directly to provide trash disposal or other services—activities which this Court has characterized as a "Market Participant"—has long depended on the ability to enforce requirements such as that City-generated trash must go to City-owned facilities.

City of Springfield believes that the method that the Respondent Town of Clarkstown has chosen to provide services to its citizens is consistent with the requirements of the Commerce Clause. The City recognizes, however, that Respondent's decision to provide such services *entirely* through private companies, supported by flow control measures, presents an open constitutional question. Springfield leaves to the Respondent and its several other *amici* to explain

precisely why the Town of Clarkstown's approach should be sustained.

In contrast, the City of Springfield's approach—involving publicly-owned and financed facilities—presents none of the constitutional difficulties encountered in this case, even though it too employs "flow control" measures, albeit for a slightly different purpose. Any broad *dictum* from this Court about the unconstitutionality of "flow control" measures could easily be misread by the lower courts to undermine the time-honored authority of municipalities such as the City of Springfield to finance and operate publicly-owned enterprises and to support those enterprises with requirements that allow the City to serve its citizens through citizen-owned facilities. Indeed, the Eighth Circuit, in which City of Springfield, Missouri is located, has already purported to pass on the constitutionality of flow control measures in broad strokes, without even *considering* the obvious applicability of the Market Participant exception to Commerce Clause restrictions. *See Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993).

Therefore, the City of Springfield, Missouri files this brief in order to highlight the ways in which the approach of the Town of Clarkstown is, if not unique, not typical. The Court should be aware that however it chooses to dispose of *this* case (and it should be disposed of by affirmance of the judgment below), it should not undermine the ability of municipalities such as the City of Springfield to support *publicly-owned* facilities through flow control and similar measures.

STATEMENT

The principal goals of the City of Springfield's integrated solid waste management plan (the "Plan")

are to (1) reduce by approximately 50% the amount of solid waste (*i.e.*, household trash) disposed at the City's landfill so as to extend its useful life, and (2) ensure that those wastes are inert and do not contain hazardous substances.

The Plan was approved in a public referendum in February, 1991 by over 77 percent of the City's voters. That referendum authorized the City to issue a $17.9 million revenue bond to finance the construction and operation of a state-of-the-art Materials Recovery and Composting Facility (the "Facility"). Once built, the Facility will function as a major recycling, material separation and composting operation for the municipal solid wastes generated by the citizens of Springfield. Construction of the Facility through issuance of the municipal bonds will allow the City to enhance its trash treatment and disposal services for its residents, meet the goal of waste reduction and recycling of City-generated trash, and provide for the safe disposal of inert solid waste at the City's landfill. A contract has issued to build and operate the Facility. The underwriting of the revenue bonds has been made considerably more difficult because of the constitutional uncertainty now surrounding municipal efforts to direct city-generated trash to city-owned treatment and disposal facilities. *See Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993).

To ensure a steady stream of revenue for the new facility (which is necessary to obtain the underwriting for the bond issue), the City's citizens overwhelmingly voted to impose on themselves the obligation to dispose of *their* waste at *their* facility. Although private firms will continue to directly contract with City res-

idents for pick-up and hauling, once the new Facility is built and becomes operational, all solid waste generated by City residents must be transported to the new Facility for treatment, separation and composting. The inert solid waste will then be disposed at the City's landfill; to help defray the costs of providing this service to its citizens, separated recyclable waste (metal, paper, plastic, etc.) will be sold into the recycling market. Household hazardous waste will no longer be disposed in the City's landfill, and will be treated and disposed in accordance with the Resource Conservation and Recovery Act.

Waste delivered to the City landfill or to the Facility (once built) is subject to a per ton "tipping fee" charged by the City for the use of its facilities. The tipping fee (which usually is passed on by the haulers to their customers, the citizens of the City) finances the costs incurred by the City for providing its citizens with waste treatment and disposal services. The City specifically imposed such tipping fees as an alternative—and more equitable—way to subsidize the provision of these services than general or special taxes. The higher tipping fees were authorized under Missouri law when the City's voters approved the bond issue. *See Oswald v. City of Blue Springs*, 635 S.W.2d 332 (Mo. 1982).

Thus, the City of Springfield's Plan reflects a local government's acceptance of political and economic responsibility for the safe, efficient and effective treatment and disposal of municipal solid waste generated *by its own citizens*. The measures taken to provide these services burden only *local* residents, who have expressly approved the construction and operation of the City-owned facilities through approval of revenue

bonds. The local citizens acknowledge that the benefits of such services outweigh the burdens, thereby justifying the imposition upon themselves of the requirement that their trash must be treated and disposed at the City's facilities, even if this entails higher tipping fees. These measures do *not* burden the citizens (or their trash) of *other* municipalities, who are not subject to the financial burdens—such as revenue bonds and tipping fees—which the local citizenry have approved by plebiscite.

It is fair to say that the approach chosen by the City of Springfield is only one of several widely used throughout the nation as responsible municipalities attempt to grapple with the disposal of waste and the provision of services to their citizens. The particular mix of services which any municipality may elect to provide to its citizens certainly will vary. Some municipalities choose to provide electrical service, sewage disposal or other utilities to their citizens; some do not. Some municipalities extend the direct provision of services in connection with trash disposal to the actual pick-up and hauling of garbage, displacing private enterprise in that field; others do not. Some combine public ownership and operation with franchising of private firms or the award of exclusive contracts for some portion of the municipal service to better ensure quality and economic viability; others do not. A great many municipalities provide *for* their citizens, and at the *expense* of their citizens, a variety of city-owned and operated facilities in connection with waste disposal. This collective enterprise is financed through various combinations of taxes, fees (imposed directly on the citizens, or indirectly, as here, through tipping fees), and participation in the private

market (through the sale of recyclables sorted from the public's waste, for example).

To extend these services, municipalities have long insisted that all of their citizens utilize and support the services that those same citizens have, through the democratic process, voted to provide. That has long been part of our political and economic tradition. And this Court has confirmed it at every turn. Indeed, while strongly reaffirming the anti-protectionist principles underlying the Commerce Clause, this Court just last term in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S. Ct. 2019 (1992), was careful to note that the Commerce Clause analysis "concerning policies that municipalities or other governmental agencies may pursue in the management of *publicly owned* facilities" in the waste management field might be very different than that involving "*privately* owned and operated" facilities. 112 S. Ct. at 2023 (emphasis added).

In light of these differences, this Court has acknowledged the very special relationship associated with the provision of services by a governmental unit, and the prerogative of a local government to support those services with "protectionist" devices that otherwise might be deemed a violation of the Commerce Clause. This Court has characterized the provision of such services under the "Market Participant" doctrine. That doctrine recognizes that in the provision of public services, and in its relationship with its own citizens, a governmental unit has a special relationship with those persons which are part of that unit—the common owners, financiers, and beneficiaries of the governmental enterprise. Municipalities and states

have long possessed the authority and discretion to provide their citizens the benefits of such municipal services without providing the same to citizens in other jurisdictions. *See Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). As shown below, the doctrine applies to the type of services provided by municipalities such as Springfield, Missouri.

Despite its critical importance in the field of municipal waste management—and specifically to municipalities like the City of Springfield, which *own* their processing and disposal facilities—the Town of Clarkstown apparently has not availed itself of the "Market Participant" doctrine in defending its flow control ordinance. The Town of Clarkstown has not briefed the issue in this case or raised it in the lower courts from which this case has come.[3] That is likely because this is a case in which the limited "services" at issue involve two competing trash transfer stations, one owned by Petitioners (a private firm); the other, a privately-owned station "designated" by City of Clarkstown pursuant to a public contract.

Neither of these transfer stations provide the range of comprehensive services supplied by municipalities such as City of Springfield, which build, own and operate their facilities to treat, separate, recycle, compost and dispose of their citizens' trash. *Compare Town of Clarkstown v. C & A Carbone, Inc.*, 587

---

[3] Remarkably, some courts have purported to perform a Commerce Clause analysis of municipal flow control measures on facts that would arguably implicate the "Market Participant" doctrine, without ever mentioning or considering the issue. *See* discussion and cases at p. 25, *infra*.

N.Y.S.2d 681, 682-685. It may be because the untreated trash sorted at Petitioners' transfer station includes waste generated *both* by City of Clarkstown residents and some amount, however small, from other jurisdictions. *Id.* And, most clearly, it may be because the designated facility is simply *not* currently owned or operated by the Town of Clarkstown, although it has an option to purchase it after five years pursuant to the public contract. *Id.*

Accordingly, while this case clearly concerns a matter of great practical moment to municipalities struggling to finance and provide effective waste management services to their citizens, it does so in a setting that may not be consistent with the way that other communities are addressing these problems. Specifically, it does not present the single fact that is often deemed the *sine qua non* of the Market Participant doctrine, that is, *public ownership and operation of the enterprise*. Thus the fact that the "Market Participant" doctrine is not before the Court renders the Court's consideration of this case somewhat difficult and artificial. Even if this Court finds the Town of Clarkstown's approach to be barred by the Commerce Clause, it would be obligated to recognize, at the very least, that a different result would likely obtain if the Town of Clarkstown owned or operated its own landfill or waste facility, and was merely trying to support that facility through the purportedly discriminatory flow control measure. Application of the Market Participant doctrine to such facts can and would make a difference in the outcome of this constitutional dispute.

That being said, while the issue is more difficult where there is *no* public ownership for the supported

enterprise, it maybe possible to extend the policies which underlie the Market Participant doctrine to the facts of the instant case. The concerns which animate the City of Springfield and the Town of Clarkstown are the same. The Town of Clarkstown has chosen a somewhat different and less ambitious means of disposing of municipal waste, electing not to assume the same degree of financial and practical risks inherent in the owning and managing of the enterprise. But, the case addresses the same special relationship between the municipality and its own citizens that is reflected in the Market Participant doctrine—the freedom to prefer *and* to burden one's own citizenry for the common good, in connection with the provision of basic public services.

Therefore, *amicus* City of Springfield, Missouri is most concerned that this Court reaffirm the applicability of the Market Participant doctrine to municipal waste services, particularly where the municipality finances and operates its own waste facilities. The Town of Clarkstown also has approached the problem in a way that ought to satisfy constitutional requirements.

ARGUMENT

I. MUNICIPAL FLOW CONTROL REQUIREMENTS WHICH SUPPORT A MUNICIPALITY'S PROVISION OF SOLID WASTE MANAGEMENT SERVICES ARE NOT SUBJECT TO COMMERCE CLAUSE SCRUTINY

A. The Principles Announced in *Philadelphia v. New Jersey* and *Fort Gratiot Landfill* Do Not Apply to Publicly-Owned Facilities

Municipal trash services implemented as part of the "management of a publicly-owned facility"—with all

the attendant benefits and burdens—clearly raise very different public policy and constitutional issues than those addressed in this Court's earlier Commerce Clause waste cases. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S. Ct. 2019 (1992); *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009 (1992); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

Significantly, the Court in *Fort Gratiot Landfill* made clear that the issues presented there did not:

> . . . raise any question concerning policies that municipalities or other governmental agencies may pursue in the management of *publicly-owned* facilities.

Fort Gratiot Landfill, 112 S. Ct. at 2023 (emphasis added). In particular, this Court's decisions in *Philadelphia v. New Jersey* and *Fort Gratiot Landfill* addressed the regulatory efforts of states and municipalities to discriminate against out-of-state waste—based solely on its place of origin—in the *private* marketplace.[4] In *Philadelphia v. New Jersey*, the Court declared invalid under the Commerce Clause the efforts of New Jersey to prohibit the operator of

[4] The underlying policy driving this discrimination was the perception that other states and municipalities had not "taken care" of "their" own waste by providing or permitting sufficient (or any) public or private treatment and disposal capacity for "their" citizens. The resulting discrimination against out-of-state waste was designed to preserve the *private* waste management capacity already operating in the state at the expense of waste generated in other states. *See generally*, *Fort Gratiot Landfill*, 112 S. Ct. at 2028, (C. J. Rehnquist and J. Blackmun, dissenting).

a *private* landfill from accepting waste from out-of-state customers. And last year in *Fort Gratiot Landfill*, the Court followed *Philadelphia v. New Jersey* in declaring invalid a municipal regulation that similarly prohibited a *private* landfill operator from accepting solid waste from outside the county or Michigan.[5]

In contrast to these "private" waste cases, many municipalities, including Respondent and the City of Springfield, are providing their citizens with a range of public waste management services. Most of these services do not apply to "foreign" waste or otherwise distinguish the "place of origin" of the waste. The *only* waste typically affected is the trash generated by local citizens.[6] Frequently, the municipality has chosen to take onto itself the burden of investing millions of dollars in *publicly-owned* facilities in order

[5] The Court's decision in *Chemical Waste Management* held invalid the effort of Alabama to radically reduce the flow of *hazardous* waste into that state for disposal through an onerous and discriminatory "import fee." 112 S. Ct. 2009. The present case does not involve hazardous wastes, which are subject to a much greater level of health, safety and environmental regulation under a comprehensive federal regulatory program than non-hazardous solid waste (mostly municipal trash), in accordance with the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992.

[6] Such measures thus do not create a situation where a state or municipality seeks to justify the "scope of discrimination" by the *amount* of interstate commerce affected. *See, e.g., Wyoming v. Oklahoma*, 112 S. Ct. 789 (1992). Nor does it evidence the "primeval governmental activity" of regulatory power—such as taxes, fees or tariffs—that has been employed to "saddle those outside the State" with such regulatory burdens. *See Chemical Waste Management*, 112 S. Ct. at 2016; *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988).

to take care of a *local public problem*—treating and disposing of that locality's municipal garbage.

Measures taken to provide such services are thus akin to the efforts of a local authority to employ its police powers to place restrictions *on its own citizens* so as to address a *local* problem, efforts which this Court has upheld in the face of Commerce Clause challenges. For example, in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), the Court held that a state did not violate the Commerce Clause or otherwise discriminate against interstate commerce when it sought to prevent the "uncontrolled transfer of water out of the state" through imposition of "severe withdrawal and use restrictions *on its own citizens*" 458 U.S. at 955-56, quoted in *Fort Gratiot Landfill*, 112 S. Ct. at 2026 (emphasis added).

As this Court reaffirmed in *Fort Gratiot Landfill*, the efforts of Nebraska in *Sporhase* to engage in environmental conservation were not the sort of "economic protectionism" addressed by the holding in *Philadelphia v. New Jersey*. *Fort Gratiot Landfill*, 112 S. Ct. at 2026-27 n.6, citing *Sporhase*, 458 U.S. at 956-57.[7] As the Court in *Fort Gratiot Landfill* noted, environmental actions that are directed at *public* problems stand in stark contrast to "traditional

[7] The *only* aspect of Nebraska's program which was held invalid under the Commerce Clause was the requirement that adjoining states grant reciprocal rights to withdraw *its* water and allow its use in Nebraska. Consistent with this Court's longstanding doctrine, such efforts at creating interstate "reciprocity" requirements were invalid under the Commerce Clause. 458 U.S. at 956-58. Flow control, of course, does not purport to effect the actions of citizens—or their trash—from any other jurisdiction.

legal expectations" regarding state regulation of *private* landfills, "which are neither publicly produced nor publicly owned." *Fort Gratiot Landfill*, 112 S. Ct. at 2027 n.7.

Accordingly, this Court's decisions in *Fort Gratiot Landfill* and *Philadelphia v. New Jersey* do not apply to the "management of publicly-owned facilities."

B. Municipalities That Provide Solid Waste Management Services To Their Citizens Are Market Participants Exempt From Commerce Clause Scrutiny

It has long been clear that whatever bar the Commerce Clause might otherwise pose to local regulations which limit the flow of commerce in favor of local groups and citizens, the Commerce Clause was not intended to prohibit a state or local government from itself "participating in the market and exercising the right to favor its own citizens over others." *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980), quoting *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976); *see also White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983). Just as a state or local government may grant special benefits to the collective owners of a government supported or funded enterprise, so too may it impose special burdens and obligations on its citizens to finance and support municipal enterprises and activities. That such obligations provide some competitive advantage to the publicly-owned enterprise—to the perceived detriment of privately-owned out-of-state firms—does not render the governmental actions a form of protectionism prohibited by the Commerce Clause.

The reason for this lies in the nature of the Commerce Clause itself. The Commerce Clause was de-

signed to create of this Nation a single economic union, subject to the control of the federal government. As respects trade *between* the states, the states surrendered a portion of their sovereignty in favor of a grant of power to the federal government. State regulators were forbidden from exercising their power to enact discriminatory legislation in order to protect *private* local economic interests. The nature of the economic Union was said to require that local governments not discriminate against out-of-state businesses for the presumption was that we were all citizens of the same nation. And the Court has been vigorous in enforcing that requirement, for it is always tempting for the residents of any local area to favor their own *private* economic interests over the interests of outsiders who—without the protection afforded by the Commerce Clause—would have no means to avoid such discrimination precisely because they have no vote in local politics.

But the Commerce Clause has never been thought to affect or limit the prerogative of a state or local government to provide any particular service to its citizens.[8] The services that any given state or municipality may choose to provide are many and varied. In every instance they combine elements of govern-

[8] At bottom, by accepting responsibility to provide their taxpayers with a service to treat and dispose of "local trash," many municipalities have cast off the role of "regulator" and "entered the marketplace," for providing such services. They fund, construct and operate *publicly-owned* solid waste treatment and disposal facilities, at a cost of millions of dollars. This reflects a commitment to "take care" of one's own trash rather than impose the type of regulatory regime on the private sector with which the Commerce Clause is primarily concerned.

mental authority with participation in a private market by providing services on grounds that private firms otherwise might provide—indeed, sometimes in competition with such firms.[9] The Constitution presents no bar to the type of services a state or municipality may elect to provide to its own citizens:

> "[A] State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit. . . . A State may deem it as essential to its economy that it own and operate a railroad, a mill, or an irrigation system as it does to own and operate bridges, street lights, or a sewage disposal plant. What might have been viewed in an earlier day as an improvident or even dangerous extension of state activities may today be deemed indispensable."

Reeves, Inc. v. Stake, 447 U.S. at 443 n.16, quoting *New York v. United States*, 326 U.S. 572, 591 (1946) (dissenting opinion). But in the provision of such services, the local government that represents its citizens is free to prefer its own citizens—and, as a necessary corollary to that principle, to prefer itself over any private competitor, whether from within, or without, the state.

[9] Petitioners' boldly suggest that municipalities have no business constructing and operating waste management facilities in the first place, (Brief of Petitioner at 27 n.13), and suggest that these services should be provided solely by the "highly competitive" private market. *Id.* There is no basis for such a remarkable statement, particularly where states and municipalities traditionally have provided all types of public services to their citizens since before the founding of the Republic.

For example, in the provision of solid waste services it is clear—and Petitioners concede (Brief of Petitioner at 28-29)—that a local government could subsidize its own provision of services by the use of tax funds. In using its own tax funds to facilitate its efforts to collect or process solid waste, few would argue that it must also share those tax funds with private firms, even if those firms come disproportionately from out-of-state and seek to process the waste.[10] Although the preference for the state enterprise through tax subsidy is obviously a form of "protectionism," it is not a form of protectionism with which the Commerce Clause is concerned:

> We find the label "protectionism" of little help in this context. The State's refusal to sell to buyers other than South Dakotans is "protectionist" only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve. Petitioner's argument apparently also would characterize as "protectionist" rules restricting to state residents the enjoyment of state educational institutions, energy generated by a state-run plant, police and fire protection, and agricultural improvement and business development programs. Such policies, while perhaps "protectionist" in a loose sense, reflect the essential and patently unobjectionable purpose of state government—to serve the citizens of the State.

Reeves, Inc. v. Stake, 447 U.S. at 442 (footnote omitted). Even more clearly, in seeking to subsidize a collective enterprise, the local majority may insist through the democratic process that *every* member of the community be compelled to contribute tax funds for that purpose—whether or not they *wish* to support the enterprise or actually avail themselves of its benefits. It is difficult to draw a principled distinction between imposing a tax on the citizens to pay for such a service and imposing a requirement that they use the service and fees commensurate with its use.

The preferential provision of services and benefits to the citizens who collectively own and support a municipal enterprise would seem to present the harder case. When the collectively-owned municipal enterprise imposes special burdens or obligations on its "*owners*," it is clearly not regulating in a way that the Commerce Clause proscribes. The analogy to the quasi-political, quasi-private enterprise discussed in *Reeves* (447 U.S. at 439 n.12) is complete. A commonly-owned enterprise is free to impose special obligations or surcharges on its owners and members in order to support that enterprise. In connection with municipal flow-control in support of publicly-owned facilities, this obligation is simply the basic require-

---

[10] Indeed, Petitioners concede that Town of Clarkstown could constitutionally address the public problem of helping to manage its residents' trash by placing fees on all wastes generated in the City, imposing permit fees or taxes on trash-hauling vehicles, or increasing local taxes as "utility charges" that support such services. Brief of Petitioners at 29. However, Petitioners fail to distinguish how these constitutionally permissible measures differ in any meaningful sense from the higher tipping fees imposed at City-owned or, as in the case before the Court, city-affiliated facilities. The costs incurred by tipping fees usually are passed along by the trash hauler to the same local residents who, Petitioners concede, can be required to pay taxes to support such services.

ment that the local citizens who generate a municipality's trash should dispose of that trash in a municipality's facilities.

Where the disposition of municipal solid waste is concerned, however, it is clearly the *burdens*, and much less the *benefits*, flowing from the enterprise that are of concern. As respects the City of Springfield's Plan, for example, the citizens have agreed to go into the business, as a collective, of solid waste processing and disposal in order to properly meet what they view as their responsibilities to the environment to deal with their *own* solid waste. In so doing, they have made an investment and taken upon themselves a substantial financial risk to provide the enormous funds such an enterprise requires. And to help reduce the financial risk and make their enterprise financially viable, they have agreed to impose upon their collective selves the obligation to send their waste to the municipal facility—and thus to pay the fees which the enterprise needs to charge to sustain the enterprise. They have agreed to do this in order to ensure the viability of their common enterprise: Even though it might be less expensive to deal with trash haulers who could dispose of their waste out-of-state—or at least at some other site where "tipping fees" may be lower—they are effectively compelled to utilize the local facility.

In such circumstances, the municipal measures—including the "burden" of flow control—which make it possible for the collective enterprise to exist are not barred by the Commerce Clause, irrespective of some effect on interstate commerce. To the contrary, "[i]f the city is a market participant, then the Commerce Clause establishes no barrier to conditions such as

these which the city demands for its participation." *White v. Massachusetts Council*, 460 U.S. at 210.

Therefore, this Court's cases portend no constitutional infirmity with municipal initiatives that impose obligations on the owners of the enterprise to support the enterprise, provided that the initiative is reasonably related to the purposes of the public enterprise and narrowly operates for the very "public" which has created and which owns the enterprise. *Cf. White v. Massachusetts Council*, 460 U.S. at 211 n.7 (there are "some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business"). Public enterprises involving municipal waste are much like the bounty program for metal scrap upheld in *Alexandria Scrap*. The trash services provided by cities such as Springfield are purposely designed to encourage *local* recycling, and minimize disposal of hazardous waste at *city-owned* landfills. *See Alexandria Scrap*, 426 U.S. at 809. These municipal measures reflect the efforts of responsible jurisdictions to "take charge" of their waste through the establishment of public services at public expense. *Fort Gratiot Landfill*, 112 S. Ct. at 2027 n.9.

In *Alexandria Scrap*, Maryland's bounty program was funded by its taxpayers to meet the environmental goal of reducing the number of abandoned car wrecks on public roads. That bounty deliberately *raised* the market price for the delivery of car wrecks *in* Maryland, an action which certainly affected the interstate market for recyclable scrap. Indeed, the Virginia scrap processor there alleged that the bounty program unconstitutionally interfered with the interstate *private* marketplace in such commerce, as haul-

ers took wrecks *only* to Maryland scrap processors where a higher price—the bounty—was paid. This Court held that the bounty program, while undoubtedly burdening interstate commerce, was exempt from Commerce Clause scrutiny because Maryland's expenditure of public funds to encourage recycling was a public "enterprise" rather than simply a governmental regulation. 426 U.S. at 809-810.[11]

Where a city or state invests millions of dollars to address a local environmental and recycling problem, it "has the attributes of both a political entity and a private business." *Reeves*, 447 U.S. at 439 n.12.[12] But such actions are not "protectionist" in the context of the Commerce Clause simply because they limit "benefits generated by a state program to those who fund the state treasury and whom the state was created to serve." *Reeves*, 447 U.S. at 442. By requiring its own citizens to send their trash to the City's facility, the municipality is purposely benefiting a local pro-

[11] As this Court noted, private firms such as Petitioners:

> are not in the position of a foreign business which enters a State in response to completely private market forces to compete with domestic businesses, only to find itself burdened with discriminatory taxes or regulations.

Alexandria Scrap, 426 U.S. at 810 n.20.

[12] Even Petitioners suggest that municipalities can, consistent with the Commerce Clause, "compete for trash in the marketplace." Brief of Petitioner at 28. But the Market Participant doctrine is not based on the notion that cities or states must shed every vestige of their sovereign authority to serve the needs of their citizens. *Reeves*, 447 U.S. at 443-445. Thus, a municipality may qualify as a Market Participant for Commerce Clause purposes without becoming the private-market equivalent of Petitioners.

gram by imposing a burden on its citizens. This is the very type of "local burden" which this Court has held does not violate the principles of the Commerce Clause. *See Sporhase v. Nebraska*, 458 U.S. 941 (1982).

At the same time, by directing its citizens to send their trash to the City service system, the municipality has not limited access to a jurisdiction's "natural resources" solely to local citizens. *Compare South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984). Contrary to Petitioners' charge, these measures do not involve a jurisdiction's efforts to "hoard" natural resources such as minerals, timber, or even a landfill. Brief of Petitioner at 14-15. Instead, the municipal trash that is required to be shipped to the City facility—like cement manufactured at a State-owned factory or abandoned car wrecks that blight public roads—is the "end product" of a process over which some local control is appropriate. *See Reeves, Inc. v. Stake*, 447 U.S. at 443-444; *Alexandria Scrap*, 426 U.S. at 797-800. While certainly affecting the market for "trash" by directing where a citizen's trash must be processed or disposed, the municipality is simply serving the needs of its citizens through a public enterprise in which its citizens have invested. This is the very type of service that falls within the Market Participant doctrine. *Id.*, 426 U.S. at 810.

These cases demonstrate that the distinction between municipal regulation, which is subject to the Commerce Clause, and market participation, which is not, cannot be drawn merely by determining the source of legal authority for the challenged restraint. Rather, the distinction "should be drawn with reference to the constitutional values giving rise to the

market participant exemption itself." *White v. Massachusetts Council*, 460 U.S. at 218 (Blackmun, concurring and dissenting). These values include "considerations of state sovereignty," "the role of each state as 'guardian and trustee for its people,'" and the necessarily "subtle, complex, and politically charged" factors which enter into such market decisions. *Reeves*, 447 U.S. at 438-39.

Thus, solid waste management facilities that are publicly-owned and operated are no different than municipal fire and police services, public schools or sewage treatment plants. Cities such as Springfield, Missouri, which operate such facilities are not, as Petitioners suggest, "hoarding" valuable trash at the expense of out-of-state citizens, (Brief of Petitioner at 14-15), any more than they are hoarding police, fire or school teacher services. By directing that City-generated trash should go to the City-owned facilities, such municipalities are protecting the public safety and welfare—as well as its investment—which provides the public service in the first instance.

In Springfield's situation, "considerations of state sovereignty," the City's preeminent role as "guardian and trustee for its people," and the complex and competing considerations which entered into the citizens' decision to finance, construct, own and operate the Facility *for their own waste* underscore the constitutional wisdom of applying the Market Participant doctrine.

II. DISPOSITION OF THE INSTANT CASE

By and large, the courts which have considered the issue have applied the Market Participant doctrine to publicly-owned municipal solid waste management services. In so doing, these courts have allowed municipalities to provide their citizens a preference in access to and use of county-owned landfills, *Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245 (3d Cir. 1989), or required that private waste haulers may not dump out-of-state waste in a state-subsidized and owned landfill. *LeFrancois v. State*, 669 F. Supp. 1204 (D.R.I. 1987); *Evergreen Waste Systems, Inc. v. Metropolitan Service District*, 643 F. Supp. 127 (D. Or. 1986), *Shayne Bros., Inc. v. District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984). *But see Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 814 F. Supp. 1566 (M.D. Ala. 1993).

Some courts—including the lower courts in this case—have not addressed the application of the Market Participant doctrine at all in the context of challenges to municipal programs that require the taxpayers who pay for the service to send their trash to the city-owned and/or operated facilities. *See generally, J. Filiberto Sanitation v. Department of Environmental Protection*, 857 F.2d 913 (3d Cir. 1988); *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993); *Stephen D. Devito, Jr. Trucking v. Rhode Island Solid Waste Management Corp.*, 770 F. Supp. 775 (D.R.I.), *preliminary injunction aff'd*, 947 F.2d 1004 (1st Cir. 1991).

Nevertheless, Respondent Town of Clarkstown has engaged in the type of *public* services which, as this Court noted in *Fort Gratiot Landfill*, does not raise the "evils of protectionism" or any other activities proscribed by the Commerce Clause. Whatever burdens have been placed on the residents of the Town of Clarkstown—particularly the financial and logistical burdens inherent in flow control measures—are a per-

missible exercise of the municipality's local police powers. *See Sporhase v. Nebraska*, 458 U.S. 941 (1982).

Accordingly, the Court should affirm the judgment below. But however the Court chooses to dispose of the instant case on its particular facts, the Court should continue to affirm the ability of municipalities—through the Market Participant doctrine—to support *publicly-owned* waste management enterprises, including the use of "flow control" measures to finance such efforts.

CONCLUSION

The judgment of the lower court should be affirmed. But even if not affirmed, the decision of this Court should not call into question the constitutionality of flow control measures which support publicly-financed or operated solid waste management facilities.

Respectfully submitted,

STUART H. NEWBERGER
Counsel of Record
JEFFREY H. HOWARD
CLIFTON S. ELGARTEN
DOUGLAS KENDALL
CROWELL & MORING
1001 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2595
(202) 624-2649

Attorneys for City of Springfield, Missouri

Of Counsel:

HOWARD C. WRIGHT, JR.
City Attorney
840 Boonville Avenue
P. O. Box 8368
Springfield, Missouri 65801-8368

Dated: August 23, 1993

BEST AVAILABLE COPY

TABLE OF CONTENTS

I. INTEREST OF THE AMICI CURIAE.....1

II. SUMMARY OF ARGUMENT.....4

III. ARGUMENT.....13

A. The Regulatory Environment in Which the County's Solid Waste Disposal Utility Operates.....13

B. The County's Integrated Solid Waste Disposal Utility.....19

1. The Utility.....20

2. The Governmental Interests Served by the County's Utility Imposed by Flow Control.....24

3. Municipal Public Service Utilities Have Been Consistently Upheld by the Courts.....29

4. Flow Control is the Most Effective and Least Restrictive Means of Imposing the County's Utility.....37

C. A Brief Review of Dormant Commerce Clause Analysis.....40

D. The County's Solid Waste Disposal Utility Treats Interstate and Intrastate Business Interests Evenhandedly.....43

E. The Impact of the County's Solid Waste Disposal Utility on Interstate Business Interests Does Not Far Exceed the Local Interests Which Required the Establishment of the Utility.....49

V. CONCLUSION.....54

TABLE OF AUTHORITIES

CASES Page

Federal

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905).....31-32

Central Iowa Refuse Systems v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983).....48

City of Lafayette v. Louisiana Power & Light, 435 U.S. 389 (1978).....47

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978).....41-42,43

Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977).....44

Foster Fountain Co. v. Haydel, 278 U.S. 385 (1948).....44

G. Fruge Junk Co. v. City of Oakwood, 637 F. Supp. 422 (N.D. Cal. 1986).....34

Hodge v. Stout, 377 F. Supp. 131 (E.D. Tenn. 1974).....37

Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), vacated on other grounds, 455 U.S. 931 (1982),

on remand, 742 F.2d 949 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985).....33,46

Parker v. Brown, 317 U.S. 341 (1943).....47,49

Pike v. Bruce Church, 397 U.S. 137 (1970).....40-41,42

Takahasi v. Fish & Game Comm'n, 334 U.S. 410 (1948).....44

Toomer v. Whitsell, 334 U.S. 385 (1948).....44

State

City of Bowling Green v. Davis, 230 S.W.2d 909 (Ky. 1950).....35

City of Sikeston v. Sisson, 249 S.W.2d 345 (Mo. 1952).....37

Frier v. City of Douglas, 213 S.E. 2d 607 (Ga. 1975).....36

K. C. Elect. Assn. v. Pub. Utilities Comm'n, 550 P.2d 871 (Colo. 1976).....37

LeBlanc v. City of Plaquemine, 498 So.2d 699 (La. Ct. App. 1984).....36

Matula v. Super. Ct., 303 P.2d 871 (Cal. Ct. App. 1957).....34

North Carolina ex rel. Utilities Comm'n. v. Va. Elect. and Power Co., 311 S.E.2d 586 (N.C. 1984).....36-37

Rupp v. Grantsville City, 610 P.2d 338 (Utah 1980).....30

Stephens v. Bd. of County Comm'rs, 278 So.2d 269 (Fla. 1973).....34-35

Tigard v. Werner, 515 P.2d 934 (Or. App. 1973).....35

Village of Peck v. Hoist, 396 N.W.2d 536 (Mich. Ct. App. 1986).....30

STATUTES AND REGULATIONS

42 U.S.C. §6901 et seq.....14

Md. Envir. Code Ann. §§9-501 et seq. (1987 & Supp. 1992).....17,22

Prince George's County, Md., Code §21-146 (1990).....18-19

MISCELLANEOUS

Maryland Department of the Environment, Maryland Solid Waste Planning Accord (1992).....27

Eugene McQuillin, Municipal Corporations, §§24.242, 24.245 (3d.Ed. 1986).....33

U.S. Environmental Protection Agency, The Solid Waste Dilemma: An Agenda for Action (1989).....14-15-.....16-17

INTEREST OF THE AMICI CURIAE

Prince George's County, Maryland operates a municipal solid waste utility to serve a population of approximately 750,000. The utility has facilities for solid waste collection, recycling, yardwaste composting and sanitary landfilling. In 1990, the County enacted a flow control ordinance that required all waste generated in the County to be delivered to the County disposal system. Recyclable materials are directed to the County's materials recovery facility; yard waste must be delivered to a composting facility; and all other waste is disposed of in one of the County's two sanitary landfills. The County has issued $60 million in revenue bonds that are secured by the

revenues of the utility to finance the cost of solid waste facilities and expects to expend $140 million in the next 10 years for the capital costs of the utility.

Carroll County, Maryland, with a rural and suburban population of approximately 125,000, operates a sanitary landfill and recycling facilities for County residents. It has recently formed a solid waste task force to study and recommend long-range solid waste disposal and recycling options. Carroll County may use flow control to implement its waste reduction, recycling and disposal policies, ensure system reliability, and facilitate the financing.

The interest of the amici curiae, Prince George's County and Carroll

County, is in the preservation of an important aspect of their police power that enables local governments to manage the ever-growing stream of solid waste. When private sector solutions falter or fail, citizens turn to their local governments to protect human health and the environment from the dangers posed by solid waste. The invalidation of flow control legislation would impede local governments across the country from implementing sound solid waste policies at a time when solid waste solutions have become more complicated and expensive.

Prince George's County's system is a paradigmatic example of how flow control can be used to implement national solid waste policy. In this brief, the Prince George's County solid

waste utility will be described in detail and analyzed under dormant Commerce Clause principles. Hereafter, Prince George's County will be referred to as the "County."

II.

SUMMARY OF ARGUMENT

The County's solid waste disposal policy is implemented through its solid waste utility and an integrated solid waste management system. The County's policy resulted from a balancing of environmental, public health, and cost considerations and not merely an identification of the least expensive capacity available on the interstate market at any particular moment. The integrated solid waste management system, on which the County's solid waste plans are based, contains a

hierarchy for solid waste solutions. It requires that waste generation be curbed and that the different components of waste stream must be matched with the most appropriate recycling, composting or disposal facility. The County's municipal utility provides for programs for waste reduction and for the recycling of approximately 35% of the waste stream by 1999; facilities for the composting of certain wastes; and the operation of two sanitary landfills.

The County's flow control ordinance requires that all solid waste generated within the County's borders be delivered to a designated County facility, where the County then controls how the waste will be disposed of and what inter- and intrastate resources and expertise will be brought to bear to do so.

Flow control is a key element in the success of the County's solid waste disposal utility. It connects the solid waste generators with the utility. Required use of the utility through flow control serves four basic ends. First and foremost, it gets the solid waste to the County's system where each component of the waste stream can be matched with the right recycling or disposal facility. Second, flow control allows the County to create economic disincentives for waste generation and economic incentives for recycling and composting through utility pricing. Third, flow control assures that the system costs are shared equitably; generators cannot take advantage of lower costs of certain components of the system, such as recycling facilities

which are highly subsidized, and go outside the system for others. Fourth, it provides a reliable revenue source which the County uses to build the facilities and implement programs that are necessary to protect the public health and the environment.

The County enacted flow control legislation because it is, on balance, the most effective and least restrictive means available to the County to get the solid waste to its municipal utility. Flow control is simple and fair. Waste is weighed as it is delivered to the County system and per-ton charges (tipping fees) are imposed on the hauler. This system creates disincentives for waste generation. At the same time, flow control leaves the private collection system in place and

even enhances competition within it. One alternative to flow control, County collection of all garbage generated within its borders, would preempt private sector collection altogether. The County can, of course, send its own collectors to its own disposal system; flow control accomplishes the same result. The County concluded that, because commercial generators have varying demands, collection of commercial solid waste is well served by private enterprise.

Another alternative to flow control is to accept waste without any payment and then to fund the system through taxes or solid waste assessments. This is known as "economic flow control," and its legality is uncontested. Economic flow control and flow control

legislation have the same effect: both bring garbage to the County system, and displace private disposal alternatives, which cannot compete with "free" service offered by the municipal utility. The County chose regulatory flow control over economic flow control because ad valorem taxes bear no relationship to the volume of garbage generated and thus cannot serve as a disincentive to the generation of garbage. In addition, the County has limits on its taxing powers and a policy of operating its utility through self-supporting enterprise funds. Special solid waste assessments would require sophisticated utility cost accounting to develop supportable fee schedules for many different classes of residential and commercial waste generators.

Flow control legislation is motivated, not by economic protectionism, but by environmental responsibility, a concern for public health, and the need to ensure the availability of reliable disposal capacity. For the County, there is no profit in garbage. On the contrary, solid waste facilities bring with them only expense, liability and excruciating political decisions. (Indeed, it is hard to imagine a more difficult local political decision than siting a landfill.) Local governments would dismantle their disposal systems if the private sector could make garbage disappear without harm to the environment or the possibility of its return on a barge.

This legislation does not favor local interests at the expense of out-of-state interests. By creating a utility and enacting flow control, the citizens of the County, through their elected representatives, have delegated to the County utility the exclusive right to purchase all recycling and disposal services on their behalf. Far from isolating itself from the national economy, the County utility expends millions of dollars annually for goods and services from the national economy each year and returns thousands of tons of recyclable materials to national markets. The County has not turned inward, favoring local private interests, but has turned outward to embrace the technology and expertise available from national corporations.

To suggest -- as the Petitioners do -- that garbage is a valuable natural resource that the County is hoarding in favor of parochial interests evidences a serious misunderstanding of the burdens that the County has undertaken by mandating that garbage flow to its integrated solid waste management system and not to its "natural" place of repose, the cheapest disposal facility. The citizens of the County, who are also the generators of its garbage, have determined to confront the problem of solid waste generation and have eschewed the simple solution of letting the solid waste disappear into commerce where it is out of sight and out of mind. They have determined to shoulder the economic costs of responsible solid waste management. Their will to do so is

embodied in their solid waste utility and in the flow control legislation which compels each citizen to live up to that responsibility.

In short, the County's municipal utility does not discriminate against interstate business interests in either purpose or effect; it treats inter- and intrastate interests evenhandedly. Further, while flow control does impact interstate business, that impact does not far exceed the local benefits derived from imposing it.

III
ARGUMENT
A.
The Regulatory Environment In Which The County's Solid Waste Disposal Utility Operates

Local governments bear the ultimate responsibility for solid waste disposal. They are charged with the nondelegable responsibility of

preserving the public health and the environment. In the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §6901 et seq., Congress deferred to state and local governments on solid waste matters, stating that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies...." 42 U.S.C. §6901(a)(4).

In 1988, the United States Environmental Protection Agency ("EPA") convened a Municipal Solid Waste Task Force that recommended a four-tier solid waste management hierarchy of waste reduction, waste recycling, waste combustion and sanitary landfilling. U.S. Environmental Protection Agency, The Solid Waste Dilemma, An Agenda to

Action 16 (1989). EPA has recognized that this hierarchy is best implemented through local government which can "custom design its integrated waste management system to emphasize certain management practices, consistent with the community's demography and waste stream characteristics." Id. at 2. The report of the Task Force states: "[I]ntegrated waste management systems [should be used] to solve municipal solid waste generation and management problems at the local, regional, and national levels. In this holistic approach, systems are designed so that some or all of the four waste management options (source reduction, recycling, combustion, and landfills) are used as a complement to one another to safely and efficiently manage municipal solid

waste. . . . A key element of integrated waste management is the hierarchy, which favors source reduction (including reuse) [followed by recycling, which] is the preferred waste management option to further reduce potential risks to human health and the environment, divert wastes from landfills and combustors, conserve energy, and slow the depletion of nonrenewable natural resources. . . . Integrated waste management can and should be implemented at a local level to the extent practical, and is a useful conceptual tool for making management decisions." U.S. Environmental Protection Agency, The Solid Waste Dilemma: An Agenda for Action 2-3 (1989).

In its report, EPA lamented the

very problem flow control seeks to remedy: waste flight. It stated: "the incentive to build new, environmentally sound facilities and adopt better management practices may not exist in some areas because of the current practice of 'waste flight,' in which waste is shipped by truck or rail across state and county lines to areas with available capacity." Id. at 14. While waste flight may be good for commerce, it promotes an environmental race-to-the-bottom, in which cheap tipping fees are the only consideration.

In Maryland, each county must have a comprehensive solid waste management plan approved by the State Department of the Environment ("MDE"). Md. Envir. Code Ann. §§9-501 to 9-521 (1987 & Supp.

1992). The county plan must address the needs for the entire county, including all towns, municipal corporations and sanitary districts for a 10-year period and describe the solid waste disposal systems, solid waste acceptance facilities and the systematic collection and disposal of solid waste by public or private entities.

Pursuant to State law, the County has adopted a plan, which describes in detail its comprehensive and integrated solid waste disposal utility. In support of its ten-year plan, the County enacted § 21 of the Prince George's County Code which provides in pertinent part:

> The Director of Environmental Resources may order that all persons dispose of solid waste solely at any of the approved solid waste acceptance facilities. Any such order may specify the type, quantity and location of solid waste to be disposed of at solid waste acceptance facilities and such other limitations as the Director may determine.

Regulations promulgated in 1991 pursuant to this ordinance designate the County's two landfills as the approved solid waste acceptance facilities.

B.

The County's Integrated Solid Waste Disposal Utility

The County, like many local governments, has chosen to create a solid waste disposal utility to ensure that: (1) waste generated in the County is managed in a manner consistent with the County policy goals of waste reduction, recycling, composting and sanitary landfilling; (2) the costs of waste management are equitably allocated; (3) the utility's pricing can assist with waste management by creating

economic incentives for waste reduction and recycling; and (4) revenues are adequate to pay for the facilities and programs that are necessary to protect public health and the environment. The courts in this country, including this Court, have consistently upheld the imposition of municipal utilities to provide public services (such as sewer, water, electricity, and solid waste disposal) on an exclusive basis. The County has concluded that flow control is the most effective and least restrictive means of imposing its solid waste disposal utility.

1.

The Utility

The County's disposal system consists of waste reduction programs, recycling programs, composting

facilities and two landfills. The first landfill, the Brown Station Road Landfill, is owned and operated by the County to serve its southern portions, a service area of approximately 270 square miles with a population of approximately 352,000, which generates approximately 300,000 tons of solid waste annually. Over the next ten years, the County expects to expend approximately $69 million to cap completed portions of this landfill, to construct additional cells to expand the leachate collection and treatment systems and to construct wetlands mitigation areas required by the U.S. Army Corps of Engineers permits. The County operates a methane recovery system at the Brown Station Landfill which generates electricity that is sold to Potomac Electric Power Company.

Maryland requires the County to have a recycling plan providing for at least a 20% reduction in the waste stream by January, 1994. Md. Envir. Code Ann. §9-505 (1987 & Supp. 1992). The County adopted recycling legislation and a recycling plan designed to achieve a 35% recycling rate by 1999. The County sponsors a curbside recycling program for 114,000 single family households, which recovers approximately 27,000 tons of recyclable materials including newspapers, glass, metals and plastic. In fiscal 1994, the County expects to expand the program by approximately 40,000 households and add additional recyclable materials. The County expects its recycling programs to cost approximately $9 million in fiscal year 1994. This cost has been and will

be funded by the tipping fees paid at the County's two landfills.

The County has contracted for the development of a materials recovery facility where recyclable materials (collected by the County, or delivered by municipalities or other County generators) will be processed for marketing. This facility will cost approximately $12 million and will be built and operated by a private recycling firm under contract with the County.

The County also operates yard waste composting facilities, where in 1992 approximately 12,000 tons of leaves and grass were delivered by County contract collections. These facilities are operated by a Maryland state agency under contract with the County. The

County also operated "drop off" facilities for recyclables which recovered approximately 16,000 tons of recyclables in 1992.

2.
The Governmental Interests Served by the County's Utility Imposed Through Flow Control

The flow control ordinance connects County-generated garbage with the County's modern, integrated solid waste utility where the County sends different components of the waste stream to the recycling, composting and disposal facilities that are the most appropriate. Recyclables are sent to recycling facilities and do not end up in landfills. As markets for a particular recyclable material come and go, the County can adjust the flow of material within its system. The County's curbside collection of

recyclables feeds a materials recovery facility. This facility will increase recycling levels and minimize the impact of solid waste disposal on the environment. The facility, however, could not compete in the marketplace with the least expensive alternative available for the disposal of garbage.

The County's utility provides for a fair allocation of the costs of waste disposal. All County businesses and residents pay for the cost of the integrated management system, and the system impacts all economic interests that touch it, including both inter- and intrastate interests. Virtually every affected person or company has room to complain that the utility could be structured in a manner that would better serve that interest's financial

position. Some generators or collectors might prefer to use low cost, out-of-state landfills in the short term, knowing that they can bring their waste home to the reliable County utility when those landfills are no longer available or become more expensive than the County's. There can be no doubt that some residential generators may prefer to have their non-recycled waste taken to low-cost, out-of-state landfills, but still receive the free curbside recycling, which is funded by tipping fee revenues. Some haulers may prefer to use disposal facilities that are owned or controlled by the haulers themselves; they recognize that access to those facilities puts them at a competitive pricing advantage over smaller haulers

that depend upon the spot market or the County utility. The County utility through flow control requires that all of these divergent economic interests use the system and pay their fair share of the allocable costs.

As a municipal utility, the County can charge a tipping fee that provides an economic disincentive to generate solid waste, thereby promoting the County's waste reduction goals. Solid waste management experts and environmental regulators have criticized those systems -- unlike the County's -- that bury disposal costs within a general tax and do not impose disposal costs on those who generate waste. E.g., Maryland Department of the Environment, Maryland Solid Waste Planning Accord 1 (December 18, 1992)

("the only reliable way to reduce waste generation is for those who generate waste to pay for its processing and disposal"). The tipping fee also generates funds to pay for the County's recycling programs; allowing those programs to encourage recycling by offering low cost or free service. Through its utility pricing mechanisms, the County utility has the power to skew behavior in a way that is environmentally beneficial. These pricing mechanisms will not work if generators or haulers can opt out of the utility or select to use only portions of it that are favorably priced.

The expense of sound solid waste management is significant. Over the next 10 years the County estimates that it will make $140 million of capital

expenditures for these facilities. Tipping fee revenues, if secured by a flow control ordinance, provide a reliable revenue source for the County utility to pay system expenses. In 1990, the County pledged its tipping fees and other system revenues in order to secure revenue bonds, which it issued to finance capital improvements to its system.

3.

Municipal Public Service Utilities Have Been Consistently Upheld by the Courts

The County's solid waste utility, imposed through its flow control ordinance, serves the same purpose as the regulatory requirement imposed by municipal sewage utilities that require households to hook-up to the municipal sewer system. It is settled that an

ordinance requiring households to connect to a municipal sewer utility is a valid exercise of the police power. See, e.g., Rupp v. Grantsville City, 610 P.2d 338, (Utah 1980); Village of Peck v. Hoist, 396 N.W. 2d 536, (Mich. Ct. App. 1986). Further, a municipal utility may require connection to sewer services, even though it employs private contractors in the operation of the sewer utility. Rupp v. Grantsville City, 610 P. 2d at 341 ("while the operation of the utility is a proprietary activity, the power to compel connection with the sewer system is a governmental exercise of the State police power"). Local ordinances compelling residents to connect to a municipal utility are upheld on a two-pronged rationale: first, the

connection requirement flows from local government's traditional police power to protect public health and safety, and second, the local government has a legitimate interest in assuring the economic viability of the utility.

In California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 318 (1905), this Court upheld the validity of a San Francisco ordinance compelling all garbage within the city and county limits of San Francisco to be delivered to a designated facility for incineration pursuant to an exclusive fifty-year franchise. The franchisee brought suit against a rival Colorado corporation and various garbage collectors who continued to collect garbage designated for disposal at plaintiff's facility and haul it to San

Mateo County for disposal. The Court rejected defendants' takings and due process arguments and held that the ordinance constituted a valid exercise of the police power. The Court observed that "it may be taken as firmly established in the jurisprudence of this court that the states possess . . . the power to prescribe such regulations as may be reasonable, necessary and appropriate for the protection of the public health and comfort; and that no person has an absolute right to be at all times and in all circumstances wholly freed from restraint." Id. at 317. The Court further noted that "[m]any of the questions involved in municipal sanitation have proved difficult of solution. There is no mode of disposing of garbage and refuse

matter, as found in cities and dense populations, which is universally followed." Id. at 320.

Likewise, in Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), the Sixth Circuit noted that:

> Control of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local governments under the Tenth Amendment. Ordinances regulating garbage collection and disposal are rationally related to a matter of legitimate local concern. Courts in literally hundreds of reported cases have upheld the authority of local governments to monopolize and control local garbage collection by eliminating or restraining competition among private collectors. [Citations omitted.] If any area of the law can be said to be well settled, this is one. Id. at 1192.

A multitude of cases reaffirm this basic proposition. See McQuillin, Municipal Corporations, §§24.242, 24.245 (3d. ed.

1986). For example, in Matula v. Superior Court, 146 Cal. App. 93, 104, 303 P.2d 871, 878 (1957), the California Court of Appeals stated: "Whatever powers a city possesses to remove garbage and refuse are predicated upon the assumption that a failure in this respect would result in a menace and danger to the people of the whole state, and the authority or power to prevent such endangerment stems from the police power of the state." Accord, G. Fruge Junk Company v. City of Oakland, 637 F.Supp. 422 (N.D. Cal. 1986) (upholding exclusive solid waste franchise ordinances against challenges by a solid waste hauler and recycler who claimed that the exclusive franchise was invalid on equal protection, due process and antitrust grounds); Stephens v. Board of

County Commissioners of Okaloosa County, 278 So.2d 269 (Fla. 1973) (upholding against due process challenges a special law authorizing the board of county commissioners to grant franchises for garbage services, set rates and otherwise regulate solid waste collection and disposal based on the police power to protect public health); Tigard v. Werner, 515 P.2d 934 (Or. App. 1973) (sustaining an exclusive waste collection franchise against challenges that an enabling ordinance that forbade anyone from "unlawfully collecting and hauling garbage and waste materials of another" deprived the rival collector of property without due process); City of Bowling Green v. Davis, 230 S.W.2d 909 (Ky. 1950) (holding that an exclusive franchise for garbage collection was

valid because such arrangements were implicitly authorized by the state when it delegated to the city discretion in caring for the health of its inhabitants).

The courts have also held that a municipality may grant an exclusive right to provide electricity to its residents. See, e.g. Frier v. City of Douglas, 213 S.E.2d 607 (Ga. 1975) (holding that municipalities may preempt other electric suppliers and may even compel customers who wish to terminate service in favor of another supplier to continue to use the town's service); LeBlanc v. City of Plaquemine, 448 So.2d 699 (La Ct. App. 1984); State of North Carolina ex re. Utilities Comm'n. v. Va. Elect. and Power Co., 311 S.E.2d 586 (N.C. 1984) (holding that town had

exclusive right to continue providing electric service); K.C. Elect. Ass'n v. Public Utilities Comm'n, 550 P.2d 871 (Colo. 1976). Further, courts have ruled that connection to a municipal utility may be required to ensure that there are sufficient revenues to ensure the payment of bonds issued to construct and operate the utility. See, e.g., Hodge v. Stout, 377 F. Supp.131, 135 (E.D. Tenn. 1974); City of Sikeston v. Sisson, 249 S.W.2d 345 (Mo. 1952).

Flow Control is the Most Effective and Least Restrictive Means of Imposing the County's Utility

The County could have captured flow of solid waste for the County systems, through the displacement of private collection systems, either by extending the County collection system or

establishing an exclusive franchise for waste collection in the County with a requirement that all waste be delivered to the utility. However, the flow control measure adopted by the County was a less restrictive alternative. The County decided not to interfere with the existing collection practices for commercially-generated solid waste and residential waste generated outside of the County collection districts. The extension of County collection to the commercial sector would have disrupted the collection arrangements established between County businesses and their private haulers. These arrangements are more varied than are residential arrangements and are tailored to meet a wide variety of businesses and their solid waste generation and disposal needs.

The flow control legislation also protects those solid waste collectors who are not affiliated with companies that own landfill or incinerators from being eliminated from the marketplace, and enhances competition among the solid waste collection companies serving the County.

The County's other alternative for assuring that the solid waste is delivered to the County system is the offering of free or below-market service. To do this it would have to raise funds to pay for system expenses from taxes or solid waste assessments. It could then eliminate or discount the tipping fee, and garbage from the entire County would flow to the system. This would do nothing to reduce waste generation. Moreover, one source of

County funding, property taxes, bear no relationship to solid waste generation. To allocate the County's limited taxing powers to this purpose would impair other County functions and conflict with the County's policy of generating its solid waste utility on a self-supporting basis. The other funding source, a solid waste assessment, is difficult to impose and administer because it requires sophisticated cost accounting to develop supportable fee schedules for many different classes of waste generators.

C.

A Brief Review Of Dormant Commerce Clause Analysis

In Pike v. Bruce Church, 397 U.S. 137, 142 (1970), this Court articulated the rules governing the constitutionality of state regulation

challenged under the dormant Commerce Clause:

> [W]here the statute regulates evenhandedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

If the purpose of state regulation is "simple economic protectionism," that is, to favor local economic interests over interstate interests, the regulation violates the Commerce Clause. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). Further, this Court has ruled that "the evil of protectionism can reside in legislative means as well as legislative ends." Philadelphia v. New Jersey, 437 U.S. at

626. Thus, if the effect of state regulation is to discriminate against interstate economic interests in favor of local interests, it is invalid. Id. Conversely, if state regulation treats interstate and intrastate commerce evenhandedly to accomplish legitimate local goals and affects interstate economic interests only incidentally, this Court will uphold the regulation unless the burden on interstate economic interests is "clearly excessive" in relation to the local benefits to be achieved. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970). The burden is on the party challenging a state law on grounds that it violates the dormant Commerce Clause to establish that the law discriminates against interstate economic interests in either purpose or effect.

D.

The County's Solid Waste Utility, Imposed Through Flow Control, Regulates Interstate And Intrastate Economic Interests Evenhandedly

In Philadelphia v. New Jersey, 437 U.S. at 622, this Court observed that solid waste can constitute an article of interstate commerce. Here, the Petitioners seize on this observation and contend that the flow control regulation imposed by the Town of Clarkstown discriminates against interstate commerce because it prohibits the exportation of the solid waste from the Town and thereby "hoards" this article of commerce for the sole benefit of intrastate interests. Petitioner's Brief at 23. In support of this argument, Petitioners rely primarily on the line of cases in which this Court

has ruled that a state law that is enacted for the purpose (or which has the effect) of "hoarding" a valuable natural resource for the exclusive benefit of local economic interests is discriminatory and invalid. Foster Fountain Co. v. Haydel, 278 U.S. 553, 598-600 (1928); Toomer v. Whitsell, 334 U.S. 385, 402 (1948); Takahasi v. Fish & Game Comm'n, 334 U.S. 410, 420-421 (1948); Douglas V. Seacoast Products, Inc., 431 U.S. 265 (1977). This argument, however, inaccurately describes the economic interests that are impacted by flow control regulation.

Garbage does not constitute a valuable natural resource that is bargained for on an interstate market. Rather, the generators of garbage pay, often handsomely, for its removal and

disposal. Thus, flow control does not prohibit the exportation of, or hoard, a natural resource.

The economic effect of flow control is to impose, in favor of a local municipal utility, the exclusive right to decide how solid waste will be managed. The economic interests affected by flow control are those of businesses, both interstate and intrastate, that would, in the absence of the monopoly, profit from the right to make the disposal choices made by the utility. Accordingly, when the actual economic interests impacted by flow control are examined, it is apparent that flow control does not discriminate against out-of-state businesses. Its impact falls evenhandedly on in-state and out-of-state business.

Opponents of flow control contend that flow control offends the dormant Commerce Clause because it precludes out-of-state facilities from competing with the facilities of the municipal utility. Pursuant to its affirmative Commerce Clause power, Congress has affirmatively regulated anti-competitive practices by the enactment of federal antitrust laws. It is settled that municipal flow control ordinances enacted pursuant to a clearly expressed state policy do not violate these antitrust laws. Hybud Equipment Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), vacated on other grounds, 455 U.S. 931 (1982), on remand, 742 F.2d 949 (6th Cir. 1984), cert. denied, 471 U.S. 1004 (1985).

In Parker v. Brown, 317 U.S. 341, 350-51 (1943) this Court upheld a state program restricting agricultural production on grounds that the Sherman Act did not restrain state governmental action, holding that "nothing in the language of the Sherman Act or in its history . . . suggests that its purpose was to restrain a state or its officers from activities directed by its legislature." In City of Lafayette v. Louisiana Power of Light Co., 435 U.S. 389, 414 (1978), the Court held that the state action doctrine does not automatically exempt from antitrust laws all municipalities simply by virtue of their status as governmental entities. Rather, the Court concluded, "the Parker doctrine exempts only anti-competitive conduct engaged in as an act of

government by the State as sovereign, or, by its subdivisions, pursuant to state policy to displace competition with regulation or monopoly public service." In Central Iowa Refuse Systems v. Des Moines Metro. Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983), the Eighth Circuit ruled that the state action doctrine protected the anti-competitive practices of certain municipalities in which they required that all solid waste be disposed of at designated facilities. Accordingly, there can be no doubt that Congress, through an exercise of its Commerce Clause power, intended to permit municipal utilities to engage in anti-competitive practices that are necessary for the provision of essential public services such as solid waste

disposal. The exclusivity of service is an inherent part of municipal service utilities, and it is unreasonable to suppose that the dormant Commerce Clause can be interpreted to destroy the exemption created by Parker v. Brown and its progeny under the same provision of the Constitution.

E.

The Local Benefits Created By Flow Control Far Outweigh The Incidental Effects, If Any, On Interstate Commerce

The burden of solid waste disposal ultimately falls upon local governments, even in an era of increasing privatization of certain solid waste services. This proposition was illustrated in 1987 by the famed "garbage barge," a vessel containing over 3,000 tons of commercial solid waste that left Islip, Long Island in

search of a disposal site. After being turned away from ports in North Carolina, Louisiana, Florida, Mexico, Belize and the Bahamas, the garbage barge returned to Long Island, its point of origin. The journey of the garbage barge illustrates that when private sector solutions fail, local governments are the ones ultimately accountable for waste generated in their jurisdictions. New York's garbage barge is not the only such example. In 1988, a barge carrying 15,000 tons of Philadelphia incinerator ash finally returned to Philadelphia after eighteen months and successive rejections at ports including Haiti, Honduras, Bermuda and Guinea-Bissau. The following year, sixty-one rail cars of Baltimore sewage sludge traveled through the southern portion of our

nation for six weeks in a fruitless search for a disposal site before returning to Baltimore.

By imposing flow control, the County and other local covenants are able to ensure that the waste is disposed of in a manner that furthers the disposal and environmental policies of the local government. It is respectfully submitted that the local interests supporting the imposition of flow control are paramount.

On the other hand, the impact of flow control on interstate commerce is not significant. Interstate business interests are involved in providing services to the County utility at virtually every stage in the solid waste disposal process. Interstate companies collect garbage from residential and

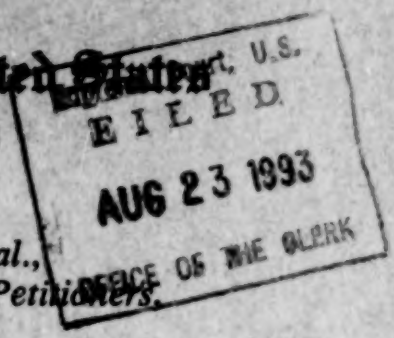
commercial generators, operate one of the County's landfills, are constructing and will operate a new composting facility and provide extensive engineering, planning and consultation services. Thus, the County's utility does not impede interstate commerce, but rather operates as the gateway to the interstate markets for solid waste generated within the County's borders.

Thus, the effect of the County's waste disposal utility on interstate commerce does not far exceed the local interests served by the utility. Because flow control such as that implemented by the County regulates inter- and intrastate commerce evenhandedly, affects interstate commerce only in an incidental manner and does not impose a burden on

interstate commerce that is clearly excessive in relation to the benefits of the regulation, it does not violate the dormant Commerce Clause.

No. 92-1402

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993



C&A CARBONE, INC., *et al.*,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

BRIEF AMICI CURIAE OF CITY OF INDIANAPOLIS, INDIANA, CITY OF TAMPA, FLORIDA, DAVIS COUNTY SOLID WASTE MANAGEMENT AND ENERGY RECOVERY SPECIAL SERVICE DISTRICT, DELAWARE COUNTY SOLID WASTE AUTHORITY, FAIRFAX COUNTY, VIRGINIA, GREATER DETROIT RESOURCE RECOVERY AUTHORITY, MARION COUNTY, OREGON, MINNESOTA RESOURCE RECOVERY ASSOCIATION, MUNICIPAL WASTE MANAGEMENT ASSOCIATION, REGIONAL WASTE SYSTEMS, INC., RESOURCE AUTHORITY IN SUMNER COUNTY, TENNESSEE, TULSA AUTHORITY FOR RECOVERY OF ENERGY AND CITY OF TULSA, OKLAHOMA, WISCONSIN COUNTY SOLID WASTE MANAGEMENT ASSOCIATION AND YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY IN SUPPORT OF RESPONDENT

SCOTT M. DUBOFF *
JOANNE M. SCANLON
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005-3502
(202) 371-5704
Counsel for Amici Curiae City of Indianapolis, Indiana, et al.

* Counsel of Record

(Additional Counsel Listed on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

SHEILA M. O'BRYAN
Assistant Corporation Counsel
1601 City-County Building
Indianapolis, Indiana 46204
Counsel for City of Indianapolis, Indiana

PAMELA K. AKIN
City Attorney
Old City Hall
315 East Kennedy Blvd.
5th floor
Tampa, Florida 33602
Counsel for City of Tampa, Florida

FELSHAW KING
KING & KING
P.O. Box 320
330 North Main Street
Kaysville, Utah 84037

MARY ANNE WOOD
WOOD SPENDLOVE & QUINN
500 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Counsel for Davis County Solid Waste Management and Energy Recovery Special Service District

MICHAEL F.X. GILLIN
230 North Monroe Street
Media, Pennsylvania 19063
Counsel for Delaware County Solid Waste Authority

JOHN D. PIRICH
HONIGMAN MILLER SCHWARTZ & COHN
222 Washington Square North
Suite 400
Lansing, Michigan 48933-1800
Counsel for Greater Detroit Resource Recovery Authority

DAVID P. BOBZIEN
County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035-0064
Counsel for Fairfax County, Virginia

ROBERT C. CANNON
Legal Counsel
Marion County
100 High Street, N.E.
Salem, Oregon 97301
Counsel for Marion County, Oregon

NICHOLAS S. NADZO
JENSEN BAIRD GARDNER & HENRY
Ten Free Street
P.O. Box 4510
Portland, Maine 04112
Counsel for Regional Waste Systems, Inc.

DAVID L. PAULING
City Attorney
PATRICK T. BOULDEN
Assistant City Attorney
City Hall Room 316
200 Civic Center
Tulsa, Oklahoma 74103
Counsel for Tulsa Authority for Recovery of Energy and City of Tulsa, Oklahoma

TABLE OF CONTENTS

	Page
INTEREST OF *AMICI*	2
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. FLOW CONTROL AUTHORITY SERVES A VITAL ROLE IN MEETING LOCAL GOVERNMENT'S RESPONSIBILITY FOR ENVIRONMENTALLY SOUND, INTEGRATED MUNICIPAL SOLID WASTE MANAGEMENT	8
II. THE EXERCISE OF FLOW CONTROL AUTHORITY FOR MANAGEMENT OF MUNICIPAL SOLID WASTE IS NOT ECONOMIC PROTECTIONIST LEGISLATION BECAUSE FLOW CONTROL ORDINANCES ARE ADOPTED IN FURTHERANCE OF LOCAL GOVERNMENT'S POLICE POWER AUTHORITY AND DO NOT RESULT IN HOARDING OF ANY VALUABLE RESOURCE	16
III. CONTRARY TO PETITIONERS' UNFOUNDED CLAIMS, FLOW CONTROL ORDINANCES PROVIDE SUBSTANTIAL BENEFITS WITHOUT IMPOSING AN UNDUE BURDEN ON INTERSTATE COMMERCE	21
IV. THE IMPACT ON INTERSTATE COMMERCE WOULD BE THE SAME UNDER ANY OF THE ALTERNATIVES THAT CARBONE SUGGESTS	24
CONCLUSION	28

TABLE OF AUTHORITIES

CASES

	Page
American Automobile Association v. United States, 367 U.S. 687 (1961)	18
Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984)	18
Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573 (1986)	18, 21
California Reduction Company v. Sanitary Reduction Works, 199 U.S. 306 (1905)	9, 13
Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1984)	15
Chemical Waste Management, Inc. v. Hunt, 112 S. Ct. 2009 (1992)	17, 18
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978)	*passim*
Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951)	21
Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978)	23
Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S. Ct. 2019 (1992)	*passim*
Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)	19
Gardner v. Michigan, 199 U.S. 325 (1905)	9, 13, 26
Glenwillow Landfill v. City of Akron, Ohio, 485 F. Supp. 671 (N.D. Ohio 1979)	12, 25
Hughes v. Alexandria Scrap Corp., 426 U.S. 974 (1976)	23
Hughes v. Oklahoma, 441 U.S. 322 (1979)	19
Hybud Equipment Corp. v. City of Akron, Ohio, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985)	12, 15, 20, 22
J. Filiberto Sanitation, Inc. v. Department of Environmental Protection, 857 F.2d 913 (3rd Cir. 1988)	22

TABLE OF AUTHORITIES—Continued

	Page
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980)	19
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981)	23
New England Power Co. v. New Hampshire, 455 U.S. 331 (1982)	19
Parker v. Brown, 317 U.S. 341 (1943)	20
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970)	21
South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177 (1938)	23
South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984)	19
Toomer v. Witsell, 334 U.S. 385 (1948)	19
Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)	20
United States v. O'Rourke, 943 F.2d 180 (2d Cir. 1991)	6, 15
West v. Kansas Natural Gas Co., 221 U.S. 229 (1911)	19

CONSTITUTION AND STATUTES

U.S. Constitution, Commerce Clause, Article I, Section 8, Clause 3	*passim*
42 U.S.C. § 6901(a)	2, 3
42 U.S.C. § 6902(b)(8)	5
42 U.S.C. §§ 6942-43	3
Fla. Stat. § 377.709	5
Me. Rev. Stat. Ann. tit. 38, § 1304-B	10, 16
Mich. Comp. Laws § 299.424(1)	10
Mich. Comp. Laws § 299.430(1)(a)	9
Mich. Comp. Laws § 299.432(4)	5
Minn. Stat. § 115A.84	10, 16
Minn. Stat. § 473.149	9
Or. Rev. Stat. § 268.317	9
Pa. Stat. Ann. title 35, § 6018.102(2)	5
53 Pa. Cons. Stat. § 4000.303(a)	9
Tenn. Code Ann. § 68-211-602(b)	5
Utah Code Ann. §§ 19-6-502, 503	9

TABLE OF AUTHORITIES—Continued

Page

Val Code Ann. § 10.1-1411 9
Va. Code Ann. § 15.1-28.01 ..... 10, 11, 16
Wis. Stat. § 159.13 10

REGULATIONS

40 C.F.R. § 241.101(k) 2
53 Fed. Reg. 36883 (1988) 13, 24
54 Fed. Reg. 52209 (1989) 5
58 Fed. Reg. 37477 (1993) 6, 14

MISCELLANEOUS

City of Indianapolis, Indiana, *Environmental Assessment of Proposed Resource Recovery Plant* (January 1986) 11
Fairfax County Board of Supervisors, *Statement Before the Joint Legislative Subcommittee of the [Virginia] General Assembly Studying Trash Flow and Resource Recovery* (October 18, 1984) 11
H.R. Rep. No. 1491, 94th Cong., 2d Sess. (1976) 14, 15
House Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess., *Symposium on Resource Conservation and Recovery* (Subcomm. Print 1976) 14
Joint GPCOG/RWS Solid Waste Management Policy Committee, *Feasible Solid Waste Disposal Alternatives for the Greater Portland/Cumberland County [Maine] Area* (1983) 11
Ann R. Mesnikoff, Note, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste at Home*, 76 Minn. L. Rev. 1219 (1992) 14, 24
Michigan Department of Natural Resources, *Michigan Solid Waste Policy* (1988) 5
Office of Technology Assessment, *Facing America's Trash: What Next For Municipal Solid Waste?* ..9, 13, 23
Reilly, William K., Statement Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works (September 17, 1991) 27

TABLE OF AUTHORITIES—Continued

Page

The Solid Waste Dilemma: An Agenda for Action, EPA/530-SW-9-019 (February 1989) ..... *passim*
U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992 Update*, EPA/530-R-92-019 (July 1992) 5, 8, 13
U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update*, EPA/530-SW-90-042 (June 1990) 5, 8
U.S. Environmental Protection Agency, *Variable Rates in Solid Waste: Handbook For Solid Waste Officials*, Vol. I 27
York County Waste Advisory Committee, *1985 Solid Waste Management Plan Update, York County, Pennsylvania* (November 29, 1984) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1402

C&A CARBONE, INC., *et al.*,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

---

BRIEF AMICI CURIAE OF CITY OF INDIANAPOLIS, INDIANA, CITY OF TAMPA, FLORIDA, DAVIS COUNTY SOLID WASTE MANAGEMENT AND ENERGY RECOVERY SPECIAL SERVICE DISTRICT, DELAWARE COUNTY SOLID WASTE AUTHORITY, FAIRFAX COUNTY, VIRGINIA, GREATER DETROIT RESOURCE RECOVERY AUTHORITY, MARION COUNTY, OREGON, MINNESOTA RESOURCE RECOVERY ASSOCIATION, MUNICIPAL WASTE MANAGEMENT ASSOCIATION, REGIONAL WASTE SYSTEMS, INC., RESOURCE AUTHORITY IN SUMNER COUNTY, TENNESSEE, TULSA AUTHORITY FOR RECOVERY OF ENERGY AND CITY OF TULSA, OKLAHOMA, WISCONSIN COUNTY SOLID WASTE MANAGEMENT ASSOCIATION AND YORK COUNTY SOLID WASTE AND REFUSE AUTHORITY IN SUPPORT OF RESPONDENT

This brief *amici curiae* is submitted in support of respondent, the Town of Clarkstown, New York. *Amici* have primary responsibility for municipal solid waste (MSW) management in their communities, and waste

II. CLARKSTOWN'S ORDINANCE IS SUBSTANTIALLY SIMILAR TO REGULATIONS ALREADY UPHELD BY THIS COURT AGAINST TAKINGS AND DUE PROCESS CHALLENGES.

This case may be characterized as *California Reduction Company v. Sanitary Reduction Works,* 199 U.S. 306 (1905); and *Gardner v. Michigan,* 199 U.S. 325 (1905), revisited. The two cases were decided by this Court on the same day, November 9, 1905. The ordinances at issue in *California Reduction* and *Gardner* are similar to Clarkstown's in that the regulation in each creates a comprehensive system addressed to the concerns of local government with sanitation upon private premises within the jurisdiction. Each regulation creates some form of exclusive public service and removes the discretion of the householder by mandating delivery of noisome waste to an established system. There are differences. *California Reduction* and *Gardner* measured the scope of the traditional and undelegated police power against the strictures of the takings and due process clauses of the Fifth and Fourteenth Amendment.[4] This Court held that the regulations met the test, as measured, because of the parallel common law duty of the householder to prevent harm by removal of noisome material occurring or created upon private premises, and because of the authority of local government to mandate its public service system for the purpose of carrying out the collective duties of the householders. The regulation thus inserted the mandatory public service system as a mere substitute for the duty of the householder. The rights of the scavenger were likewise seen as being no greater than that of the householder who had the primary duty. This Court significantly stated;

> . . . the municipal authorities might well have doubted whether the substances that were PER SE dangerous or worthless would be separated from such

[4] U.S. Const. Amend. 5 & 14.

> as could be utilized, and whether the former would be deposited by the scavenger at some place that would not endanger the public health. They might well have thought that the public safety of the community could not be assured unless the entire mass . . . was carried . . . where it could be promptly destroyed . . . and thus minimize the danger to the public health.

California Reduction, supra, 199 U.S. at 323.

III. FOR THE PURPOSE OF ANALYSIS, THE MSW WASTE INDUSTRY MAY BE DIVIDED INTO DISCRETE SEGMENTS.

The MSW waste industry may be divided into segments which roughly approximate the market as it has developed, including

i) generation;

ii) removal (or collection);

iii) consolidation;

iv) resource recovery for reuse (also referred to as recycling);

v) processing (where waste is treated for use as a resource, or is baled for further transport);

vi) transportation; and

vii) disposal.

Philadelphia v. New Jersey, supra, as measured against the analysis, involved only the latter two segments. This case involves only the first and second. It is important to observe that there are both private and public players in the market, and that the legal principles which determine the rights and relationships of the players in a given case will depend upon the extent of their involvement in one or more of the segments. *Philadelphia v. New Jersey, supra,* did not hold that any public policy created a national market in waste, nor did it hold that any

federal policy mandated any local market in waste, only that waste already in the stream of commerce as a result of market operations could not be made subject to barriers based upon state boundaries. The first segment virtually always involves only local regulation and concern. The second, removal or collection, is local but may be related to an interstate market analysis if the collector is part of that market and receives the waste unrestricted as to its disposition. Consolidation, through use of facilities such as Clarkstown's transfer station, may or may not be strictly local. Separation of recoverable material and processing for reuse or transport will normally be strictly local, as is the case with Carbone's Recyclery in Clarkstown. Transportation and disposal may be strictly local or may involve interstate movements. All of the segments may or may not impact interstate commerce, depending upon ownership, the existence or non-existence of a market, and/or regulation.

IV. CARBONE'S RECYCLING OR RESOURCE RECOVERY OPERATION IS STRICTLY LOCAL AND DOES NOT IMPACT INTERSTATE COMMERCE.

Carbone imports MSW to its Recyclery in Clarkstown where it is combined with similar locally collected waste and used as a source of valuable and marketable materials. As a local owner of a resource recovery facility, Carbone is free under Clarkstown's policy to import or not to import MSW. Undoubtedly, the separation of valuable material from MSW in Clarkstown for resale is a profitable business for Carbone. Clarkstown's policies have strictly local impact upon Carbone, and in fact restrain Carbone only with respect to the useless MSW waste residue which remains from the operation of Carbone's local recycling business. In this respect the useless waste residue is not different in kind from the other local waste which more likely than not will also be partially composed of imported items or by-products.

This Court addressed a similar issue in *Waring v. Mobile,* 8 Wall. (44 U.S.) 110 (1869), except that the issue there involved foreign commerce. The Court's analysis is nevertheless instructive on the issue. There the Court stated:

> When the importer sells the imported articles, or otherwise mixes them with the general property of the state by breaking up the packages, the state of things changes, as was said by this court in the leading case, as the tax then finds the articles already incorporated with the mass of property by the act of the importer. Importers selling the imported articles in the original packages are shielded from any such state tax, but the privilege of exemption is not extended to the purchaser, as the merchandise, by the sale and delivery, loses its distinctive character as an import.

Id. at 122. *Waring* is discussed in *Hipolite Egg Co. v. U.S.,* 220 U.S. 45 (1911), where the Court discusses the contention that (the eggs) "had passed into the general mass of property in the state, and out of the field covered by interstate commerce," *id.* at 55. Here, Carbone, as a business venture, and in order to recover valuable recyclables, has brought a mass of MSW into Clarkstown, admittedly as the terminus of an interstate movement fully protected by the strictures of the Dormant Commerce Clause. But Carbone has voluntarily mixed the MSW with similar locally produced waste. Carbone nevertheless claims protection from local regulations solely because some of the useless residue is the remains from waste which previously moved in interstate commerce. The effect of Carbone's position is that if Carbone cannot show some federally protected right to insist that Clarkstown create an open market in waste removal from private premises in Clarkstown, the New York Court of Appeals' decision should be confirmed. Carbone can show no such right solely on the ground that part of the waste

processed at its recyclery previously moved in interstate commerce. If Carbone can prevail on such an argument, then every householder or operator of every private premises in every jurisdiction may claim the free and unrestricted right (as measured against local regulations) to dispose of virtually all MSW (by interstate movement) wherever they choose, since almost all such material is composed, at least in part, of material which previously moved in interstate commerce.

V. THE MOTIVES OF INDIVIDUAL MEMBERS OF LEGISLATIVE BODIES IN PASSING LAWS ARE NOT USEFUL EXTRINSIC AIDS TO CONSTRUCTION, AND ARE UNIFORMLY DISREGARDED FOR INTERPRETIVE PURPOSES.

Petitioner paints Clarkstown's ordinance as protectionist, at least in part because a witness (Charles Holbrook) ascribed the town's purpose as being to avoid payments under the minimum tonnage guarantee to the contractor. (Petitioner's Brief 5). But such motives are uniformly disregarded. *Sutherland Statutory Construction* § 48.17 (4th Ed.), citing *Aldridge v. Williams,* 3 How (44 U.S.) 9 (1845). "The motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning AND PURPOSE of the law making body." *Duplex Printing Co. v. Deering,* 254 U.S. 443, 474 (1921) (emphasis added). The issue is the validity of the ordinance as applied to the useless residue from Carbone's recyclery. If the ordinance is valid as a local police power regulation of private premises under the harm prevention attributes of the traditional and undelegated police power, it matters not what the motives of the legislators might have been. If the ordinance is not REASONABLY RELATED to the town's legitimate police power interests in preventing the harm which might result from the accumulation of noisome waste upon private premises, no motive can justify it. If it is so related, motive alone cannot defeat it. The fact that the validity

and enforceability of the ordinance secures a "flow" of revenue to support the debt instrument related to the transfer station does not transform Clarkstown from a health and safety regulator and public service provider into either a market participant or market regulator. The transfer station is reasonably related to Clarkstown's objective of systematically removing noisome waste from private premises for consolidation. The mere financing of the transfer station from the revenue stream thus created, does not invalidate Clarktown's regulation.

CONCLUSION

Clarkstown's regulation addresses its legitimate concerns with sanitation on private premises by displacing competition with respect to the removal of waste from private premises and replacing it with a comprehensive public service system. In this respect Clarkstown employs policies already approved by this Court in *California Reduction* and *Gardner,* supra, as measured against the takings and due process clauses. In the absence of a contrary view expressed by Congress, this Court should be reluctant to condemn a traditional comprehensive health and safety waste removal measure, solely because some of the useless waste residue generated upon private premises was derived from waste which was previously the subject of an interstate movement. Carbone's useless waste residue is treated no different under Clarkstown's policies than other similar locally produced material, thus there is no discrimination.[5] Since there is no market or commerce in waste in Clarkstown, its policy should be found to not affect interstate commerce, and that policy should

---

[5] As pointed out by the Court, in *Illinois v. General Elec. Co.,* 683 F.2d 206, 214 (CA7 1982), *cert. denied,* 461 U.S. 913, "The hostility is to the thing itself, not to merely interstate shipment of the thing, and an undiscriminating hostility is at least nondiscriminatory."

not be measured by this Court against the strictures of the Dormant Commerce Clause.

Respectfully submitted,

CHARLES H. YOUNGER *
100 Jefferson Street, South
Post Office Box 2795
Huntsville, Alabama 35804
(205) 533-3500
Counsel for Amicus Curiae, The Solid Waste Disposal Authority of The City of Huntsville

* Counsel of Record

APPENDICES

APPENDIX A

ORDINANCE NO. 88-419

BE IT ORDAINED by the City Council of the City of Huntsville, Alabama, as follows:

Section 1. ARTICLE IV (captioned SOLID WASTE) of Chapter 20 of the Code of Ordinances of the City of Huntsville shall be and is hereby amended to read as follows:

"ARTICLE IV. SOLID WASTE

DIVISION 1

DEFINITIONS

Section 20-254. *DEFINITIONS*

The following words, terms and phrases, wherever used in this Article, shall have the meanings delineated in the following definitions unless the context plainly indicates otherwise or that a more restricted or extended meaning is intended.

"*Acceptable Waste*" means that portion of Solid Waste characteristic of that collected or disposed of as part of normal municipal Solid Waste, including, without limitation (a) Garbage, (b) Market Refuse, (c) Rubbish, (d) Ashes, (e) Bulky Waste, (f) Street Refuse, (g)Construction and Demolition Waste, and (h) Industrial Refuse, not including, however, any of the foregoing or other Solid Waste that constitutes Unacceptable Waste or Hazardous Waste; provided however, that if any governmental agency or unit having appropriate jurisdiction shall at any time determine (i) that any substances that were not theretofore Acceptable Waste because they were considered harmful, toxic or dangerous, are not harmful, toxic or dangerous, then such substances shall thereafter be considered Acceptable Waste unless they constitute

Unacceptable Waste or Hazardous Waste, and (ii) that any substances that were theretofore Acceptable Waste are harmful, toxic or dangerous, then such substances shall thereafter not be considered Acceptable Waste.

"Act" means (a) Chapter 89A of Title 11 of the Code of Alabama 1975, as amended, (b) Act No. 80-278 enacted at the 1980 Regular Session of the Legislature of Alabama, as amended, and (c) all acts of said Legislature amendatory thereof or supplemental thereto.

"Actual Acceptance Date" means the date on which the Plant begins accepting for disposal or processing Acceptable Waste from the public generally, which such date shall be deemed to have occurred only if prior to such date there has been published in a newspaper published and having general circulation in the City a notice specifying such date with particularity.

"Agreement" means the Solid Waste and Sewage Sludge Delivery Agreement between the Authority and the City, the proposed text of which is set out in the City's Ordinance No. —— and a signed copy of which will be, on and after October 1, 1988, on file and available for public inspection in the office of the Director of Public Works at the City Hall in the City.

"Approved Receptacle" shall mean a durable, easily cleanable container with tight fitting lids, doors or covers, so as to be leakproof, rodent-proof and insect-proof.

"Ashes" means residue from fires used for cooking and for heating buildings, and cinders.

"Authority" means The Solid Waste Disposal Authority of the City of Huntsville, a public corporation and instrumentality under the laws of the State of Alabama.

"Authorized Disposal Facility" means any of the following:

(a) the Plant,

(b) the Existing Landfill, and

(c) any other facility that constitutes an "Authorized Disposal Facility" within the meaning of the Agreement.

"Authorized Receiving Facility" means any of the following:

(a) the Plant,

(b) the Existing Landfill, and

(c) any other facility that constitutes an "Authorized Receiving Facility" within the meaning of the Agreement.

"Bonds" means the Original Bonds and the Other Indenture-Secured Bonds.

"Bulky Waste" means large auto parts, tires, stoves, refrigerators, other large appliances, furniture, large crates, trees, branches, palm fronds and stumps flotage.

"Business Day" means each Monday, Tuesday, Wednesday, Thursday and Friday that is not a Holiday.

"City" means (a) the City of Huntsville, Alabama, a municipal corporation under the laws of the State of Alabama, its successors and assigns, and (b) when used with reference to a geographic area, means the area within the corporate limits of said City as they exist at the time and does not, any provision of Section 1-8 of this Code to the contrary notwithstanding, include any area outside such corporate limits but within the Police Jurisdiction.

"Construction and Demolition Waste" means lumber roofing and sheathing scraps, rubble, broken concrete, plaster, etc., conduit, pipe, wire, insulation, etc.

"Existing Landfill" means that certain landfill that is located in the City at or near the South end of Leeman Ferry Road and that is now being utilized for the disposal of Acceptable Waste.

Disposal Act, L. 1991, c. 569, authorizes localities in Rockland County, such as the Town of Clarkstown, to require that "all solid waste generated, originated or brought within their respective boundaries . . . shall be delivered to a specified solid waste management resource recovery facility" including a transfer station.

Rockland County has developed a comprehensive solid waste management plan that includes the implementation of a source-separation program for various recyclables, and the development of composting facilities, materials recovery facilities, and an environmentally-sound landfill. The Clarkstown transfer facility plays an integral role in the operation of the County Plan.

C. FLOW CONTROL PROMOTES MANY COMPELLING BENEFITS

Taking responsibility for waste recycling, energy recovery, waste reduction, and environmentally-sound waste disposal requires the ability to direct the flow of waste. Absent such control, state and local efforts to ensure safe and efficient waste disposal will fail. *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action* 14 (1989); U.S. Congress, Office of Technology Assessment, *Facing America's Trash: What Next for Municipal Solid Waste* 275 (1989).

Flow control is not a recent innovation. Ordinances directing garbage to a specific landfill or hauler are at least 90 years old. In 1905 this Court upheld two such ordinances against takings claims as valid exercises of the police power. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306

County); L. 1991, c. 369 (Madison County); L. 1991, c. 540 (Fulton County); L. 1991, c. 631 (certain towns in Westchester County); L. 1992 c. 252 (Tompkins County); L. 1992, c. 350 (Greene County); L. 1992, c. 369 (Sullivan County); L. 1992, c. 391 (Greater Troy Solid Waste Management Authority); L. 1992, c. 567 (Town of Riverhead); L. 1992, c. 629 (Westchester County).

(1905); *Gardner v. Michigan*, 199 U.S. 325 (1905). More recently, when Congress enacted RCRA, it recognized that various states and localities already "require all discarded materials be transported to a particular location" and it made clear that the legislation did not interfere with such flow control ordinances. H.R. Rep. 94-1491 at 34. At least twenty-nine states and territories have now adopted flow control ordinances.[9]

Flow control promotes New York State public policy as expressed in ECL § 27-0106, *supra* at 9, by providing at least eight benefits. First, flow control promotes the twin goals of energy recovery and recycling, two cornerstones of federal and state policy. By requiring all solid waste to be delivered to a central location, towns and their agents can ensure—in the most efficient manner possible—that all materials that can be

[9] *See e.g.*, Colorado (Colo. Rev. Stat. § 30-20-107); Connecticut (Conn. Gen. Stat. § 22A-220A); Delaware (Del. Code Ann. tit.7 § 6406 (31) (1991)); District of Columbia (D.C. Code § 6-507); Florida (Fla. Stat. §§ 403.7063; 403.713 (1986 and Supp. 1992)); Hawaii (Haw. Rev. Stat. § 340A-3(a)); Illinois (Ill. Ann. Stat. c. 34 P 5-1047); Indiana (Ind. Code §§ 36-9-31-3 & 4); Iowa (Iowa Code § 28G.4); Louisiana (La. Rev. Stat. 30:2307 (9)); Maine (Me. Rev. Stat. Ann. tit. 38, § 1304-D (West 1989 and Supp. 1991)); Minnesota (Minn. Stat. § 1158.80 (1990 and Supp. 1991)); Mississippi (Miss. Code Ann. § 17-17-319); Missouri (Mo. Rev. Stat. § 260.202); New Jersey (N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5); New York (1991 N.Y. Laws, c. 569, at 1687-89); North Carolina (N.C. Gen. Stat. § 130A-294); North Dakota (N.D. Cent. Code §§ 23-29-06(6) & (8)); Ohio (Ohio Rev. Code Ann. § 343.01 (H)(2)); Oregon (Or. Rev. Stat § 268.317 (3) & (4)); Pennsylvania (Pa. Stat. Ann. tit. 53, § 4000.303(e)); Rhode Island (R.I. Gen Laws § 23-19-10(40)); Tennessee (Tenn. Code Ann. 68-211-814); Vermont (Vt. Stat. Ann. tit. 24, §§ 2203a, 2203b); Virginia (Va. Code Ann. § 15.1-28.01); Washington (Wash. Rev. Code § 36.58.040, 35.21.120); West Virginia (W. Va. Code S 240-2-1h); Wisconsin (Wis. Stat. § 159.13(3), (11)); Virgin Islands (19 V.I.C. § 1570f).

Flow control, of course, does not violate the Sherman Act. *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 425 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985); *see Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

removed from the solid waste stream for energy recovery or recycling are indeed removed from the waste stream. Monitors divert recyclable material improperly included in the waste stream and deter improper disposal practices.

Second, flow control promotes the related goal of solid waste reduction, "a key strategy in [New York's] solid waste management policy." L. 1988, c. 70, § 2. By imposing volume-based disposal costs reflective of state-of-the-art technology, flow control ordinances encourage citizens and corporations to reduce the amount of waste they produce. *See Agenda for Action* at 34. Additionally, the removal of all materials from the solid waste stream for energy recovery, composting, and recycling reduces, by definition, the volume of solid waste. Less solid waste translates into fewer health and environmental hazards at downstream landfills.

Third, by funnelling all solid waste to a central location, flow control allows localities to thoroughly monitor the solid waste stream to ensure that hazardous and medical wastes are not commingled with solid waste. Commingling is not a hypothetical problem. Tainted solid waste damages a municipality's reputation, making it more difficult and more expensive to dispose of its solid waste, and increases the health and environmental hazards to those communities that surround compost or landfill facilities as well as to those who work at such facilities. Absent flow control, towns could not check the entire waste stream and intercept commingled waste. Flow control provides an efficient and necessary first line of defense against the commingling of hazardous and medical waste.

Fourth, both Congress and the State Legislature expressly recognized that guaranteed waste streams are crucial to the success of state-of-the-art resource recovery facilities. *See* H.R. Rep. No. 94-1491 at 34. Flow control regulations provide the investment security for such necessary projects. *Hybud Equipment Corp. v. Akron*, 654 F.2d 1187, 1190 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*,

742 F.2d 949 (1984), *cert. denied*, 471 U.S. 1004 (1985). By ensuring a steady, long-term supply of garbage, flow control provisions provide a broad financial base for revenue bonds. Such a secure, long-term foundation makes the solid waste facility an attractive investment. Absent flow control, waste-flight will disrupt and destroy the formation of a secure financial base, and revenue bonds will not be marketable. *See Central Iowa Refuse Systems*, 715 F.2d 419, 422-27; *Hybud*, 654 F.2d at 1190.[10]

In a similar manner, by guaranteeing a waste stream and stabilizing a market, flow control fosters the development of innovative recycling, composting, and energy-recovery technologies. This encouragement of new technologies was clearly contemplated by Congress when it enacted RCRA. H.R. Rep. 94-1491 at 34; *see also* 40 C.F.R. §§ 256.30, 256.31. For example, flow control can assist New York City in developing cutting-edge technology for large-scale composting of food wastes. The inability to utilize flow control will inhibit the development of new technologies and programs as well as the construction of environmentally-sound solid waste management facilities. *See Agenda for Action* at 14.

Fifth, separate and apart from providing the financial base for solid waste management facilities, flow control also ensures that garbage is actually shipped to and disposed of at environmentally-sound facilities. As recognized by Congress and the State Legislature, such facilities are essential if localities are to effectively address the garbage crisis. Flow control helps towns to guarantee that garbage is disposed of at an authorized

---

[10] In New York, $2 billion in revenue bonds have been issued over the past ten years to finance solid waste management projects. In localities with flow control, approximately $1 billion in revenue bonds are currently outstanding. Any displacement of flow control could undermine such bonds, threaten bondholders' investments, and trigger litigation rivaling the "WPPSS" saga. *See generally In re Washington Public Power Supply System*, 720 F. Supp. 1379 (D. Ariz 1989), *aff'd*, 955 F.2d 1268 (9th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 408 (1992).

facility even if flow control is not needed to finance the facility.

Sixth, flow control helps states and localities avoid financial exposure. Under *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992), a municipality may be liable for CERCLA clean-up costs incurred at disposal sites where its waste was dumped. *See* 42 U.S.C. § 9601 *et seq*. By directing municipal solid waste to a specific environmentally-sound disposal facility, localities can avoid or minimize such liability. *Northside Sanitary Landfill v. Indianapolis*, 902 F.2d 521 (7th Cir. 1990) (city may concentrate its garbage at a single site given concern about clean-up costs at another site).

Seventh, in the context of transfer stations, flow control can reduce the volume of truck traffic as well as the volume of garbage transported to another facility. Transfer stations reduce waste volume by removing recyclables and then compacting the residue for shipment. Also, by consolidating the contents of several collection trucks for shipment in one larger truck, transfer stations reduce truck traffic. Mulvey, "Cost Guidelines for the Recycling Option," *printed in Selected Papers from the 1989 Conference on Solid Waste Management and Materials Policy* (New York State Legislative Commission on Solid Waste Management, 1989); *Filiberto Sanitation, Inc. v. State of New Jersey Dept. of Environmental Protection*, 857 F.2d 913, 920 (3rd Cir. 1988).

Eighth, by providing municipalities an opportunity to obtain an accurate characterization of their waste streams, flow control provides an indispensable tool for developing a viable, comprehensive solid waste management plan. *Filiberto Sanitation*, 857 F.2d at 920. According to the EPA, the identification of the waste stream's components and volume is an indispensable first step towards solving the problems associated with garbage generation and disposal. Office of Solid Waste, U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992*

Update ES-1 (1992). Similarly, New York statutes require local solid waste management plans to contain, first and foremost, a "characteriz[ation of] the solid waste stream." ECL § 27-0107(1)(b)(i); *accord* ECL § 27-0405(2)(a).

For these reasons, flow control promotes many compelling local, state, and national interests.

D. THE CLARKSTOWN TRANSFER STATION PROTECTS THE COMMUNITY'S HEALTH AND ENVIRONMENT

1. The Clarkstown Landfill

The Clarkstown landfill opened in 1950. In 1980 DEC determined that the landfill constituted a "significant threat to the public health [and] the environment." R. 181, 202-03. Garbage was placed directly into the groundwater, and leachate was seeping into the groundwater and threatening the drinking water. R. 175-76. Therefore, DEC ordered the Town to close the landfill, listed it in the Registry of Inactive Hazardous Waste Disposal Sites, and assessed significant penalties. R. 189, 203. As a result of DEC's enforcement action, the Town agreed to construct a state-of-the-art transfer station that ultimately would form part of a county-wide solid waste management program. A private contractor, Recycling Center Inc. ("RCI"), constructed and operates the transfer station, charging $81 per ton of trash.[11] While petitioners complain about the Town's tipping fee, the difference in operations between their facility and Clarkstown's more than justifies the 15% differential.

2. Clarkstown's Transfer Station & Petitioners' Facility

Petitioners' characterization of the "simpl[e] transfer station," Pet. Br. at 13, masks the complexity of the Clarkstown facility. To gain access, each truck must first pass between two

[11] The Town has an option to purchase the station in 1995.

geiger counters to ensure no radioactive waste is present. Next, a Town employee examines the truck's manifest and weighs the truck. Video cameras record each entry. The transfer station itself is a huge three-story building, with a large bay area inside on the second floor where the solid waste is deposited. Here, Town and RCI employees visually check the waste for the presence of recyclables, hazardous waste, and medical waste. A roof and walls surround the transfer bay and contain blowing litter and unpleasant odors. Workers and machines then segregate recyclable materials such as tires, wood, cardboard, metal, branches, and yard clippings. The tires, metal, and cardboard are shipped to recycling centers. The Town pulverizes the wood and yard clippings and deposits the residue in the Town's compost field, located next door. After the recyclables are separated, machines load the non-recyclable residue into tractor-trailer dump trucks waiting below on the first floor or compress it for other trucks. The tipping fee charged by the Clarkstown facility reflects the cost of the environmentally-sound practices employed at a state-of-the-art facility.

In contrast, petitioners' site has no perimeter fence, no enclosed dumping bay, no enclosed loading area, and no radioactive waste sensors. Also, petitioners' recycling claims ring hollow in light of the police investigation that revealed that petitioners send recyclable material, such as steel rims and truck springs, to landfills and incinerators. R. 50, J.A. 17. Moreover, it appears that petitioners improperly mixed medical waste, including surgical gloves and intravenous feeding bags, with the solid waste. J.A. 17. While petitioners assert that they deal only in non-Clarkstown or non-New York State waste, the police officers' identification of Clarkstown waste at the site of the March 8, 1991 highway accident belies that claim. R. 55-6. Given these practices, it is no surprise that petitioners wish to avoid the inspection regimen of the Clarkstown facility.

ARGUMENT

FLOW CONTROL PROVIDES SUBSTANTIAL LOCAL BENEFITS WITHOUT RESTRICTING INTERSTATE COMMERCE

A. The Purpose of the Commerce Clause

The dormant Commerce Clause acts as a limitation on the states' authority to erect protectionist state barriers that would threaten the operation of the federal union. The Commerce Clause has been construed to preserve our "national solidarity" by preventing states from isolating themselves from problems common to all and fomenting "rivalries and reprisals" similar to those that existed under the short-lived Articles of Confederation. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935); *West v. Kansas Natural Gas*, 221 U.S. 229 (1911). This grant of general power upon Congress to regulate commerce, however, did not preempt the states' police powers. "[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the State to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 350 (1977); *Parker v. Brown*, 317 U.S. 341, 360-61 (1943). Although petitioners apparently view the Commerce Clause as a constitutional antitrust provision, its focus instead is the protection of interstate markets, not particular interstate companies, from unduly burdensome regulations. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978).

B. Standard Of Review

This Court has developed two standards of review in analyzing Commerce Clause issues. First, economically protectionist regulations, that is, those regulations that discriminate against interstate commerce in favor of in-state interests, are subject to strict scrutiny. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *Philadelphia v. New Jersey*, 437

U.S. 617, 624 (1978). A court may find that a state law constitutes "economic protectionism" (1) if the statute differentiates between in-state and out-of-state interests by favoring the former or burdening the latter or (2) if the statute was motivated by a discriminatory purpose. The inquiry into whether or not a discriminatory purpose motivated the statute usually centers on the legislative history behind the enactment. *See Washington Apple*, 432 U.S. 333, 352; *Clover Leaf Creamery*, 449 U.S. at 471, n. 15; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269-71 (1984). While in practice, the strict scrutiny standard results in a virtual *per se* rule of invalidity, "[a]s long as a state does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (citation omitted).

Second, in contrast to protectionist regulations, "evenhanded" regulations, that is, those regulations that apply equally to in-state and out-of-state interests, are subject to a balancing test outlined in *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970). Under the *Pike* standard, an "evenhanded" state regulation is valid even if it effects an incidental burden on interstate commerce so long as that burden is not clearly excessive in relation to the local benefits. The examination of "incidental burdens on interstate commerce" is a comparative standard, and focuses on the degree to which a state action burdens interstate commerce relative to intrastate commerce. *Clover Leaf Creamery*, 449 U.S. at 471-72; *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960). Where the burden on out-of-state interests is no different from that placed on similar in-state interests, there is no burden on *interstate* commerce; rather, there is only a constitutionally unobjectionable burden on all commerce. Thus, evenhanded legislation will normally be upheld.[12]

[12] Only in rare instances, such as in *Pike* itself, where there are *both* substantial costs imposed on out-of-state interests and *de minimus* local benefits, will evenhanded regulations be struck down.

C. The Strict Scrutiny Test Is Inapplicable

In contrast to their position below where they urged the trial Court to apply the *Pike* balancing test, petitioners now strenuously argue that the strict scrutiny standard should apply. Pet. App. 19a. The strict scrutiny test has no application here. To begin with, the Ordinance is facially neutral. The Ordinance applies to "all solid waste within or generated within the Town." To that end, "*[a]ll* solid waste . . . shall be removed, transported and/or disposed of only by carters licensed [by the Town]" and *any* and *all* solid waste, regardless of origin, is to be transported and delivered to the Town's transfer station. Pet. App. 50a-53a (emphasis added). Moreover, the Town has established a single, uniform tipping fee for each ton of solid waste brought to the transfer station, regardless of its origin. Thus, the Ordinance "visits its effects on both interstate and local business." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987).

Even if the Ordinance is perceived as burdening the interstate flow of solid waste, it is clear that the Ordinance similarly burdens Clarkstown garbage. The Ordinance's equal treatment of interstate and local solid waste defeats application of the strict scrutiny standard. In each decision applying that standard the Court has been confronted by a statute that imposed an export or import ban on a certain good, while permitting the continuation of in-state trade in that good. *Philadelphia v. New Jersey*, 437 U.S. 617 (law precluded out-of-state trash from being disposed of in New Jersey, but did not similarly restrict disposal of New Jersey trash); *Fort Gratiot*, — U.S. —, 112 S.Ct. 2019 (same effect); *Chemical Waste Mgmt. Inc. v. Hunt*, — U.S. —, 112 S.Ct. 2009 (1992) (law established higher tipping fee for out-of-state-solid waste but did not so burden in-state waste); *Baldwin*, 294 U.S. 511 (statute barred retail sale of Vermont- produced milk in New York); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (law precluded export of Oklahoma minnows for sale, but allowed in-state sales). It is discrimination against the *inter*state movement of goods, while favor-

ing or failing to burden the *intra*state movement of goods, that triggers the strict scrutiny standard. This point was made most clearly in *Philadelphia v. New Jersey* where the Court stated that while New Jersey could not stem the depletion of landfill capacity by blocking the disposal of only out-of-state trash, it could pursue that goal without violating the Commerce Clause by slowing the flow of all waste, both in-state and out-of-state, into its landfills, even though such a strategy would impede the flow of out-of-state waste across its border. 437 U.S. at 626.

Unlike the situations in *Washington Apple*, 432 U.S. at 352, or *Bacchus*, 468 U.S. at 269-71, there is no evidence of discriminatory purpose behind the Ordinance. Here, the Town Board arranged for the facility's construction and adopted the Ordinance only after DEC determined that the landfill constituted a danger and ordered it closed. The purpose of the Ordinance was to ensure the delivery of all solid waste to the transfer station so as "to benefit the health, welfare, and safety of the town residents." Pet. App. 50a. These articulated purposes deserve deference, *see Clover Leaf Creamery*, 449 U.S. at 463 n. 7, 471 n. 15, and include promoting New York State's public policy of reducing solid waste volume, increasing resource recovery and recycling, and ensuring safe and reliable handling of solid waste. Even if the Ordinance primarily burdened interstate companies, which it does not, that fact "does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce." *Exxon*, 437 U.S. at 125. Discrimination simply is not present.[13] Far from protecting the Town residents' economic interests, the Ordinance works to the residents' economic disadvantage since the same $81 tipping fee that applies to out-of-state haulers also applies to all in-state haulers that come to the facility. Given this equal treatment, it cannot be said that Clark-

[13] The Clarkstown facility ships non-recyclable solid waste to many of the same sites to which petitioners shipped waste. Accordingly, petitioners' suggestion, Pet. Br. at 34-5, that the Clarkstown facility "obstruct[s] the use of solid waste as a source of energy" is disingenuous.

stown is imposing the "full burden" of supporting the transfer facility upon out-of-state interests. *Philadelphia v. New Jersey*, 437 U.S. at 628. Restrictions on out-of-state interests are permissible so long as they are evenly applied to in-state interests. "Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the state." *Sporhase v. Nebraska*, 458 U.S. 941, 955-56 (1982). Here, "[t]he existence of major in-state interests adversely affected by the [law] is a powerful safeguard against legislative abuse" and justifies the application of the balancing test. *Clover Leaf Creamery*, 449 U.S. at 473 n. 17; *South Carolina State Highway Dept. v. Barnwell Bros. Inc.*, 303 U.S. 177, 187 (1938); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675 (1981); *Fort Gratiot*, 112 S.Ct. at 2029 (Rehnquist, C.J., and Blackmun, J., dissenting).

D. Under the *Pike* Balancing Standard, the Ordinance Is Valid

This Court has applied a balancing test to several evenhanded regulations, like the Clarkstown Ordinance, that do not differentiate between in-state and out-of-state interests. In *Clover Leaf Creamery*, the Court applied the balancing test and upheld a statute that prohibited all retailers from selling milk in plastic, non-returnable cartons. Although the statute did burden out-of-state plastic manufacturers, "this burden [was] not 'clearly excessive' in light of the substantial state interests in promoting conservation of energy and other natural resources and easing solid waste problems." 449 U.S. at 473; *see Huron Portland Cement*, 362 U.S. at 448 (burden did not outweigh benefits of evenhanded smoke abatement ordinance).

In a Commerce Clause challenge against a similar flow control law, the Third Circuit Court of Appeals applied the *Pike* test and upheld the statute. *Filiberto Sanitation, Inc. v. New Jersey Dept. of Environmental Protection*, 857 F.2d 913, 919-

22 & n.1 (3d Cir. 1988). The regulation in *Filiberto Sanitation* provided several benefits including ensuring the proper disposal of all trash, reducing truck traffic, providing accurate data for planning purposes, facilitating long- and short-term contracts for final disposal, and discouraging illegal dumping by directing garbage to prescribed sites. The county transfer station charged $100 per ton. Filiberto claimed it charged $50 per ton. *Id.* at 916.

Recognizing that legitimate health and safety regulations may unavoidably effect an incidental burden on interstate commerce, *id.* at 918-19 (citing cases), the Third Circuit focused on whether the regulation saddled out-of-state interests with the burden of the solution to New Jersey's solid waste problem. The court held that the regulation did not constitute economic protectionism because: it applied equally to in-state and out-of-state interests, *id.* at 921; no discriminatory purpose was identified, *id.* at 920-21; and the garbage continued to flow into interstate commerce. Accordingly, the court declined to apply the heightened scrutiny standard and instead applied the balancing test. Finding no burden that discriminated against interstate commerce and the existence of compelling local benefits, the Third Circuit rejected the Commerce Clause challenge. *Id.* at 922.

The Sixth Circuit Court of Appeals has also upheld an ordinance directing that all trash be delivered to a waste-to-energy plant. *Hybud Equipment Corp. v. Akron*, 654 F.2d 1187 (6th Cir. 1981). The Sixth Circuit balanced the parties' claims. Since the ordinance was a legitimate exercise of the police power and its burden "f[e]ll hardest" on Akron residents and interests, it did not constitute a discriminatory burden on out-of-state interests and did not violate the Commerce Clause. 654 F.2d at 1194-95; *see also In re Waste Disposal Agreement*, 237 N.J. Super. 516, 568 A.2d 547 (N.J. Super. 1990); *In re Fiorillo Bros.*, 242 N.J. Super. 667, 577 A.2d 1316 (N.J. Super. 1990); *Harvey & Harvey, Inc. v. Delaware Solid Waste Auth.*, 600 F. Supp. 1369, 1379-1381 (D. Del. 1985).

Like fire and police protection, the control of local sanitation—including garbage collection and disposal—remains a paradigmatic example of the exercise of municipal responsibility and power. *California Reduction Corp.*, 199 U.S. 306; *Gardner v. Michigan*, 199 U.S. 325. As the Second Department correctly noted below, "[l]ocal governments have long been authorized to enact laws relating to the 'safety, health, and well-being of persons or property' (N.Y. Const., Art. IX, § 2 [c][10]), and it is well settled that the regulation of solid waste collection and disposal, a function traditionally entrusted to State and local governments, is fundamentally related to the public health and welfare." Pet. App. 9a (citations omitted).

Police power ordinances, such as Clarkstown's, have a strong presumption of validity. As this Court stated in *California Reduction*, "[e]very intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety." 199 U.S. at 319. This is so because states retain the authority to regulate matters of state and local concern on which Congress has not spoken. *See Parker v. Brown*, 317 U.S. at 360-363. Given the hazards associated with garbage and its negative economic value, *see Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 253 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990), and their traditional responsibility for garbage disposal, states and localities have, and must continue to have, the power to direct garbage to facilities that can safely dispose of it. As the Appellate Division recognized below, the focus of such police power regulation is "public welfare, rather than profit." Pet. App. 10a. "Where Congress has not acted, a state's own health and safety-oriented trash disposal regulation violates no federal constitutional precepts, provided it neither unduly protects its own citizens nor discriminates against another state's citizens." *In re Waste Agreement*, 568 A.2d at 555; *Parker v. Brown*, 317 U.S. at 367. Moreover, where such regulations are consistent with overall Congressional legislation, as in the present case, they should receive greater deference.

No. 92-1402

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

Supreme Court, U.S.
FILED
AUG 23 1993
OFFICE OF THE CLERK

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

BRIEF *AMICI CURIAE* OF OGDEN PROJECTS, INC.; LEHMAN BROTHERS, INC.; SMITH BARNEY SHEARSON INC.; SANTEK ENVIRONMENTAL, INC.; AND READING ENERGY COMPANY IN SUPPORT OF THE RESPONDENT

ROBERT C. BERNIUS *
DEXTER EWEL
NEAL J. CABRAL
NIXON, HARGRAVE, DEVANS & DOYLE
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 457-5300

JEFFREY R. HOROWITZ
OGDEN PROJECTS, INC.
40 Lane Road
Fairfield, NJ 07007
(201) 882-9000
* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE INTENT, PURPOSE AND EFFECT OF LOCAL FLOW CONTROL IS NOT TO PROTECT LOCAL INTERESTS, BUT RATHER TO ENABLE A MUNICIPALITY, AS SOLID WASTE DISPOSER OF LAST RESORT, TO DISPOSE OF GARBAGE SAFELY	4
A. Introduction	4
B. Flow Control Is Not Protectionist	6
C. Flow Control Is Essential for Municipalities to Meet Their Obligations As Solid Waste Disposers of Last Resort	8
D. Flow Control Is an Integral Component of Solid Waste Facility Financing and Is Critical to Future Solid Waste Facility Development	11
II. UNDER THE BALANCING CRITERIA, ALTERNATIVES TO FLOW CONTROL DO NOT PRODUCE EQUAL RESULTS	16
III. LOCAL FLOW CONTROL DOES NOT IMPACT INTERSTATE COMMERCE BECAUSE IT IS A PURELY LOCAL SOLUTION TO A LOCAL PROBLEM	19
CONCLUSION	21

TABLE OF AUTHORITIES

CASES: Page

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 205 (1905) 6
Cities Service Gas Company v. Peerless Oil & Gas Company, 340 U.S. 179 (1950) 20
City of Chicago v. Sturges, 222 U.S. 313 (1911) 11
City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 6, 7, 8
Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources, 504 U.S. ——, 112 S. Ct. 2019 (1992) .....e 7, 10
Gardner v. Michigan, 199 U.S. 325 (1905) 20
H.P. Hood & Sons, Inc. v. DuMond, 335 U.S. 525 (1949) 8
Hughes v. Oklahoma, 441 U.S. 332 (1979) 7, 8
Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985) 5
Hybud Equip. Corp. v. City of Akron, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985) 5, 6
Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) 7, 8
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 20
Parker v. Brown, 317 U.S. 341 (1943) 19, 20
Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 6, 8, 16
United States v. O'Rourke, 943 F.2d 180 (2d Cir. 1981) 12
Waste Systems Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993) 15

STATUTES:

42 U.S.C. § 6901(a) (4) (1988) 20
42 U.S.C. § 6913 (1988) 14
42 U.S.C. §§ 6942-43 (1988) 21
42 U.S.C. § 6943(a) (5) (1988) 14

TABLE OF AUTHORITIES—Continued

Page

N.Y. Local Finance Law § 2 (McKinney's 1968) 12
N.Y. Local Finance Law § 4 (McKinney's 1968) 13
N.Y. General Municipal Law § 864 (McKinney's 1986) 12

MISCELLANEOUS:

Economic and Institutional Barriers to Private Investment in Resource Conservation and Recovery, Symposium on Resource Conservation and Recovery: Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976) 14
Julie Forster, "Down in the Dump," *Winona Daily News*, March 18, 1992 at 1 15
1A Frank P. Grad, Treatise on Environmental Law § 4.02 (1991) 5
Gutis, "The End Begins for Trash No One Wanted," *New York Times*, Sept. 2, 1987, at B1, col. 3 9
H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238 14
Office of Solid Waste, United States Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action*, (Sept. 1988) 5
Office of Technology Assessment, Congress of the United States, *Facing America's Trash: What Next for Municipal Solid Waste?* 1 (1989) 5, 10, 20
"Soil on Troubled Waters," *New York Times*, Apr. 29, 1987, at A34, col. 1 (editorial) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-1402

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

On Writ of Certiorari to the Supreme Court, Appellate Division, Second Department of the State of New York

---

BRIEF *AMICI CURIAE* OF OGDEN PROJECTS, INC.; LEHMAN BROTHERS, INC.; SMITH BARNEY SHEARSON INC.; SANTEK ENVIRONMENTAL, INC.; AND READING ENERGY COMPANY IN SUPPORT OF THE RESPONDENT *

INTERESTS OF THE AMICI CURIAE

Amici provide waste disposal and investment banking services to municipalities that seek to implement their solid waste management plans. *Amici* assist municipalities to finance and construct waste-to-energy facilities, recycling facilities, compost facilities, transfer stations and landfills.

---

* *Amici curiae* submit this brief, on consent of all parties pursuant to Rule 37.3 of this Court, in support of Respondent Town of Clarkstown.

Flow control supports the solid waste management planning process, permitting municipalities to develop local, state-of-the-art disposal facilities. *Amici* believe that if the decisions below are not affirmed, municipalities will be forced to adopt more expensive and less efficient means of implementing solid waste management plans required by federal and state environmental legislation.

The purpose of this *amici curiae* brief is to provide the Court with the private sector perspective on the nature of municipal solid waste projects and the critical role that flow control plays in the safe, efficient disposal of garbage.

OGDEN PROJECTS, INC. (OPI) is an industry leader in the design, construction and operation of environmentally safe, technologically superior waste-to-energy facilities. OPI currently operates 24 projects at 23 locations across the United States, with four more projects under construction. These facilities are located in fifteen states from Massachusetts to Hawaii. These 24 projects process 28,135 tons per day of solid waste, accounting for 28% of the waste-to-energy market.

LEHMAN BROTHERS INC. (Lehman Brothers) is a recognized national leader in financing solid waste/resource recovery facilities. Since 1980, Lehman Brothers has been or continues to be senior manager, co-managing underwriter or financial advisor on over 110 current and completed financings which involve total financings of over $11 billion. Lehman Brothers works with municipal clients to analyze financing alternatives and to create financing structures to meet the ongoing solid waste needs of its clients.

SMITH BARNEY SHEARSON INC. (Smith Barney) has been involved in financing solid waste systems since 1975. Smith Barney has represented as investment banker or financial advisor over 60 major cities, counties and authorities. Smith Barney clients range from major

cities such as the Cities of New York and Los Angeles to rural counties. Since 1984, Smith Barney has managed 99 solid waste financings totaling approximately $8.8 billion.

SANTEK ENVIRONMENTAL, INC. (Santek) designs, constructs, permits and manages state-of-the-art landfills on behalf of municipalities. Santek is a leader in the publicly owned, privately operated landfill industry.

READING ENERGY COMPANY (Reading Energy) is a privately-owned company specializing in the development, ownership and operation of resource recovery and waste processing facilities. Reading Energy's approach to resource recovery and waste processing seeks the most environmentally responsible solutions to the pressing problems of waste management. Reading Energy has developed and continues to develop waste-to-energy facilities across the United States.

SUMMARY OF ARGUMENT

The intent, purpose and effect of local flow control is not to protect local interests, but rather to enable a municipality, as solid waste disposer of last resort, to dispose of garbage safely. Lower courts have reached inconsistent, confused and incorrect conclusions by applying Commerce Clause analysis to garbage in a wooden, reflexive manner. The usual analysis assumes that the item in commerce has value. Garbage does not have value; it is a problem and it stinks. Municipalities do not enact flow control laws because they want more garbage business, they do so as part of their solution to a garbage problem. The ordinance is not protectionist because the Respondent is not attempting to protect local commercial interests, it is attempting to protect its solution to a local garbage problem. If the Petitioners were to go out of business, Respondent would still have the obligation to dispose of waste in order to provide for the health, safety and welfare of its citizens. The purpose of flow control

is not to make money for a municipality, but rather to ensure the success of its solid waste management plan. Flow control is an integral component of solid waste facility financing. In order to issue bonds to finance facility construction, waste (and the associated tipping fees) must be directed to the facility to ensure that sufficient revenues are available to pay bondholders.

Alternatives to flow control, such as economic flow control or municipal ownership of a comprehensive waste collection system, are never as effective and are always less efficient than legal flow control.

Local flow control does not impact interstate commerce because it is a purely local solution to a local problem. Modern environmental legislation such as the Resource Conservation and Recovery Act of 1976 places the burden of closing outdated landfills and creating new solid waste management systems squarely on the shoulders of municipalities like the Respondent.

ARGUMENT

I. THE INTENT, PURPOSE AND EFFECT OF LOCAL FLOW CONTROL IS NOT TO PROTECT LOCAL INTERESTS, BUT RATHER TO ENABLE A MUNICIPALITY, AS SOLID WASTE DISPOSER OF LAST RESORT, TO DISPOSE OF GARBAGE SAFELY

A. Introduction

Garbage is a unique commodity. Garbage has negative economic utility. Garbage stinks. People pay to get rid of garbage, not to acquire it. States try to ban its importation. Residents bitterly oppose siting disposal facilities in their neighborhoods. Garbage attracts vermin. It creates fire and explosion hazards, and it pollutes the air and groundwater. Municipal garbage disposal sites constituted 22% of Superfund's 1986 proposed National Priority List. Garbage is a local, state and national health

and safety problem. Garbage *qua* garbage is not, as Petitioners claim, a "valuable commodity." Petitioners' Brief (Pet. Br.) at 14.

Lower courts have inconsistently resolved the tension between usual Commerce Clause jurisprudence and the traditional obligation of municipalities properly to dispose of all garbage within their jurisdictions. Where, as here, a commodity has negative value and is shipped in interstate commerce not to consume it, but solely to get rid of it, Commerce Clause analysis can result in confused and unsatisfactory results. The analysis is further complicated by the fact that municipalities do not enter the garbage disposal business voluntarily, but rather to meet a traditional obligation to dispose of all garbage. *Amici* thus believe the unique circumstances of this case do not readily lend themselves to usual Commerce Clause analysis.

Safe garbage disposal has long been the exclusive province of local municipalities.[1] *Gardner v. Michigan*, 199

---

[1] *See* Office of Solid Waste, United States Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action*, at 11 (Sept. 1988); (ultimate responsibility for waste management falls on state and local governments); 1A Frank P. Grad, *Treatise on Environmental Law* § 4.02, at 4-46 (1991) (1987 fifty-state survey indicating, *inter alia*, which states specifically place responsibility for garbage collection and disposal on local governments); *Hybud Equip. Corp. v. City of Akron*, 654 F.2d 1187, 1192 (6th Cir. 1981) *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985). ("Control of local sanitation, including garbage collection and *disposal* . . . is a traditional exercise of municipal police powers reserved to state and local governments under the Tenth Amendment") (emphasis added). State solid waste management activity has historically been minimal, and "for the most part limited to formally delegating authority to municipalities for solid waste management . . .". Office of Technology Assessment, Congress of the United States, *Facing America's Trash: What Next for Municipal Solid Waste*, (1989), at 348; Office of Solid Waste, United States Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda for Action*, Availability of a Draft Report and

U.S. 325 (1905). This exclusive local jurisdiction has been unsuccessfully attacked on antitrust grounds, *Hybud Equip. Corp. v. City of Akron*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, 471 U.S. 1004 (1985), and on property "takings" grounds, *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 205 (1905). Petitioners now attack this exclusive local jurisdiction on dormant Commerce Clause grounds. This is a tired argument that has been raised in various guises but repeatedly rejected by the courts.

B. The Ordinance Is Not Protectionist

Petitioners contend that the ordinance fails the "economic protectionism" test of *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). Pet. Br. at 16-25. Garbage disposal is a recognized national problem. Petitioners contend that an ordinance that seeks to cure a local contribution to that problem somehow implicates protectionist concerns. Petitioners are wrong. *City of Philadelphia* does not apply to this case because Respondent's ordinance is not protectionist in intent or effect.

The test applied in *City of Philadelphia* was whether the law in question "is basically protectionist, or whether it can be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." 437 U.S. at 624. If a local ordinance passes the *City of Philadelphia* test, then the incidental impacts on interstate commerce are to be evaluated under the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) wherein the Court must consider the "nature of the local interest involved" and "whether it could be promoted *as well* with a lesser impact on interstate activities", 397 U.S. at 142 (emphasis added).

Announcement of Public Hearings, 53 Fed. Reg. 36,885 (1988) ("State and local governments should assume responsibility for the wastes generated within their jurisdictions").

Local flow control ordinances are not protectionist. They do not implicate any of the concerns articulated in *City of Philadelphia* or any of the other concerns that underlie the usual dormant Commerce Clause analysis.

This case is unique. It is the first to come before this Court where Commerce Clause protection is sought for garbage *qua* garbage. This case is *not*, as Petitioners contend, Pet. Br. at 20, about *preserving* a state's natural resources, as in *City of Philadelphia*, 437 U.S. at 617.[2] Here state resources are being *expended* by siting a local solid waste facility to solve a local problem. Similar resources of other states are necessarily *conserved*.

This case is not therefore about economic isolation, or about economic Balkanization, or about protecting parochial state interests, as Petitioners contend. Pet. Br. at 15-16. Respondent is not hoarding a natural resource or product for its own use. It is solving its local *problem*: the scourge of local garbage.

Respondent is not attempting to foist its health and safety problem on other states, as was the case in *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 687 (1981) (state statute may not secure to the state the benefits of large trucks, while also diverting to other states the many safety and economic costs associated with their use). Respondent is not enacting a politically expedient scheme "to isolate itself in the stream of interstate commerce from a problem shared by all," *City of Philadelphia*, 437 U.S. at 629; it is *solving* its garbage problem in a way that does not interfere with the ability of other municipalities to cure their own garbage disposal problems.

---

[2] *See Hughes v. Oklahoma*, 441 U.S. 332, 331 (1979) (characterizing the state action in *City of Philadelphia* as an attempt to "conserve" the natural resource of landfill areas within the state); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't. of Natural Resources*. 504 U.S. ——, 112 S.Ct. 2019 (1992) (striking down garbage import ban on same grounds as *City of Philadelphia*).

The purpose of prohibiting economic Balkanization is to avoid trade embargos and retaliatory state practices. *H.P. Hood & Sons, Inc. v. DuMond*, 335 U.S. 525, 532-33 (1949). If all states enacted export bans on products or services, remaining states would be deprived of raw materials or competitive products or services, and the national economy would suffer.[3] By contrast, a municipality effectively *removes* a burden from other jurisdictions when it disposes of garbage—an action that is consistent with federal mandates and state laws that require the proper management and disposal of solid waste.[4]

This case is about garbage *qua* garbage, and garbage is a *problem*, not a commodity. There simply can be no protectionist intent or effect when a municipality seeks to resolve locally its contribution to a national problem.

C. Flow Control Is a Tool Essential for Municipalities to Meet Their Obligations As Solid Waste Disposers of Last Resort

Local governments in the United States are the disposers of last resort for solid waste generated within their borders.[5] Contrary to the claims of Petitioners, the primary purpose of flow control is *not* to enhance a municipality's economic fortunes. Pet. Br. at 11, 15. The purpose of flow control is to ensure the success of local solid waste management plans and to enable municipalities to plan, design and construct solid waste disposal facilities. The reason municipalities seek in the *first* instance to design and construct their own solid waste disposal facilities is because they are the ones in the *last* instance with the obligation to dispose of solid waste.[6] The driving force behind acquiring control of the entire wastestream is the municipality's ultimate responsibility to manage and resolve the entire disposal crisis it faces.

Garbage cannot be allowed to accumulate in backyards, on curbs and in empty lots without adverse public health consequences. Traditional practices and federal and state law impose on municipalities the heavy burden of assuring that there is someplace to dispose of garbage, that this disposal option is structured to mitigate the public health problems garbage creates, and that the solution they select is reasonably affordable to their residents. It is not sufficient that municipalities solve only today's problem by relying on short-term solutions. To support the inevitable growth of their communities, municipalities must find long-term solutions to their disposal problems.

This obligation forces municipalities to exercise a fundamental police power by instituting solid waste management plans. In *amici*'s experience, municipal officials do not see solid waste disposal as a commercial opportunity,

---

[3] Examples include bans on the export of minnows, *Hughes v. Oklahoma*, 441 U.S. 332; uncrated cantaloupes, *Pike v. Bruce Church, Inc.*, 397 U.S. 137; unimpeded movement of interstate trucking, *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662; and landfill space, *City of Philadelphia v. New Jersey*, 437 U.S. 617).

[4] Local flow control ordinances do not, however, impede business competition in solid waste disposal services, as Petitioners contend. *See* Pet. Br. at 33. *Amici*'s experience, based on numerous municipal solid waste transactions, is that the solid waste disposal market is very competitive. Municipal solid waste disposal contracts are overwhelmingly competitively bid by municipalities. Once this process is complete, the competition is over for the life of the contract. But this does not detract from the interstate competition that occurred during the competitive bidding process.

[5] *See supra*, n.1.

[6] The sagas of the so-called "garbage barges" provide a striking example of what happens when a municipality fails to plan and provide for adequate disposal capacity for all the waste disposed of within its borders. *See* Gutis, "The End Begins for Trash No One Wanted," *N.Y. Times*, Sept. 2, 1987, at B1, col. 3 (describing the end of the 162-day, 6,000-mile odyssey of a barge filled with trash); "Soil on Troubled Waters," *N.Y. Times*, Apr. 29, 1987, at A34, col. 1 (editorial) (describing wandering garbage barge from Islip, N.Y.).

but rather as an expensive, unpleasant and extraordinarily difficult obligation that is theirs alone to satisfy.

Once a municipality determines to design and construct a solid waste management facility, flow control becomes an important tool to meet that goal. A municipality cannot solve its entire solid waste problem unless it can control the flow of all solid waste within its borders. First and foremost, flow control permits the municipality to assure that all the waste generated within its borders is disposed of in a manner protective of human health and the environment. Not only is this responsible conduct but it may be necessary to avoid the imposition of Superfund liability on the community for improper disposal practices. Flow control minimizes the uncertainty surrounding solid waste disposal planning, especially in the area of sizing. This Court has characterized "accurate forecasts about the volume and composition of future waste flows" as an "indispensable part of a comprehensive solid waste management plan." *Fort Gratiot Landfill,* 112 S.Ct. at 2027.

If a disposal facility is too small, the municipality risks being unable to dispose of all solid waste, and being forced into expensive, stop-gap solutions. If the municipality's facility is oversized, economic dislocations arise and the municipality's costs become open-ended and uncertain, rather than managed and planned.

Environmental protection, long-term certainty and local crisis control are the motivating forces behind flow control ordinances, not, as Petitioners contend, Pet. Br. at 21-23, economic efficiency or advancement of parochial state interests. Municipalities do not wish to attract solid waste facilities to their borders. All municipal officials are painfully aware of the vehemence of local opposition to any solid waste facility.[7] In deciding on an available solid

[7] *Facing America's Trash,* at 3, n.2 (noting increasing public opposition to siting any solid waste facility).

waste disposal option, a municipality is interested, *first* and *foremost,* in reliable, environmentally sound, long-term disposal capacity to support its role as disposer of last resort.

In this sense, the Respondent's solid waste functions are similar to those of police and fire protection services. When we speak of police and fire protection services, we do not speak of the interstate or spot markets for these services, nor do we speak of business efficiency, nor do we speak of protecting local police and fire protection agencies from out-of-state competition. Instead, we speak of and recognize the need for municipalities to have their own police and fire protection services. *City of Chicago v. Sturges,* 222 U.S. 313, 322 (1911).

D. Flow Control Is an Integral Component of Solid Waste Facility Financing and Is Critical to Future Solid Waste Facility Development

When a municipality decides to meet its obligation as solid waste disposer of last resort by developing a transfer station, landfill, recycling facility, composting facility or waste-to-energy facility, it must determine how to finance it. Such facilities are capital intensive and very expensive.[8] Complex financial transactions necessarily become an integral part of a municipality's undertaking to provide these basic services. Few, if any, municipalities have the necessary funds on hand to pay for the required construction. Most municipalities have no choice but to borrow funds to finance such facilities in a time of shrinking budgets, insufficient tax revenues, economic recession and public resistance to tax increases.

If the community decides to obtain the benefits of a waste disposal facility by contracting for the construction

[8] In the experience of *amici,* modern solid waste facilities range from recycling facilities costing $5 to $10 million to waste-to-energy facilities costing $150 to $300 million.

and operation of a facility to be owned by the private sector, then the private owner must borrow funds (generally from the municipality) and justify the investment of its equity.

In *amici*'s experience, most municipalities that finance their own facilities issue revenue bonds, whether the facility is publicly or privately owned. The sole source of funds for payment of principal and interest on revenue bonds is the revenue stream generated by the subject facility.[9] Private financings are likewise secured primarily by a pledge of the revenues from the facility. Before investors will purchase such bonds at reasonable interest rates, they must be confident that there will be sufficient revenues from the operation of the facility to cover payments of principal and interest to the bondholders.

In order to guarantee a flow of revenues to the project, the municipality must guarantee a sufficient flow of solid waste to the facility at fixed prices. A flow control ordinance is the mechanism that ensures an adequate supply of waste to the facility. Through this mechanism, the municipality is able to guarantee the revenue stream that accompanies the flow of waste and to provide the necessary credit support for the issuance of bonds to construct the facility. *United States v. O'Rourke,* 943 F.2d 180, 188 (2d Cir. 1981).

---

[9] Revenue bonds should be distinguished from general obligation bonds. Under state law, the issuer of general obligation bonds pledges its full faith and credit (that is, the power to tax constituents) to the payment of bondholders. The issuer of revenue bonds pledges only an identified stream of revenue to the payment of bondholders. *See, e.g.*, N.Y. Local Finance Law § 2 (McKinney's 1968) (requirement that municipality pledge full faith and credit for the payment of principal and interest on general obligation bonds); N.Y. General Municipal Law § 864 (McKinney's 1986) (requirement that revenue bonds issued by an industrial development agency be special obligations payable solely from revenues).

Almost all solid waste financings also include contracts for the sale of facility outputs such as electricity, steam, recyclable materials or compost. Revenues from such sales do not represent profit for the municipality, but rather serve to offset a portion of the tipping fee. In order for such sales to be economically viable, the purchaser expects that the output of the facility will be dependable. Failure to meet this expectation can have severe economic consequences. For example, failure of a waste-to-energy facility to deliver dependable electric power to a utility may result in the forfeiture of the capacity payment due under the facility's contract with the utility. A guaranteed supply of solid waste is critical to maintaining the flow of revenue from the sale of facility output.

Even if a municipality were to finance the facility by issuing general obligation bonds, a guaranteed revenue stream would be necessary. A bond rating agency would seriously consider the adverse effects on a municipality's credit rating if the municipality were to place its full faith and credit behind bonds that were not supported by a guaranteed revenue stream from the facility, thereby driving up not only the cost of the facility, but also everything else the municipality borrows money to purchase. General obligation bonds are not, therefore, commonly issued to finance solid waste facilities because of the inability of municipalities to pledge their general credit for such projects as well as concerns about exceeding state constitutional debt limits.[10]

Use of a guaranteed waste flow as credit support for issuing municipal revenue bonds that finance solid waste facilities is precisely the type of transaction Congress envisioned when it considered the issue under the Resource Conservation and Recovery Act of 1976 (RCRA). Congress was keenly concerned about municipalities' ability to finance their own solid waste facilities. Congress

---

[10] *See, e.g.*, N.Y. Local Finance Law § 4 (McKinney's 1968).

concluded that private companies were "capable of and willing to enter into resource recovery ventures if sufficient volumes of refuse [could] be guaranteed over a sufficiently long period of time." H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6272. Congress enacted specific provisions to encourage removal of state barriers to a municipality's ability to provide long-term guarantees of waste volumes. 42 U.S.C. § 6943(a)(5) (1988).[11] Congress considered, but explicitly rejected, loan guarantee programs for solid waste resource recovery projects. Instead, Congress directed EPA to establish teams of personnel to provide expertise for local planning efforts, including development of solid waste financing techniques. 42 U.S.C. § 6913 (1988). Congress recognized that solid waste disposal facilities would be financed primarily by issuing revenue bonds supported by guaranteed wastestreams. *See* H.R. Rep. No. 1491, *reprinted in* 1976 U.S.C.C.A.N. at 6248, 6316.[12] In response to this congressional initiative, states enacted

[11] RCRA's legislative history specifically endorsed, as a model for state planning, Wisconsin's regionalized waste management planning approach, which authorized legal flow control by providing that the local solid waste authority could require use of its facilities in order to make them financially viable. H.R. Rep. No. 1491, *reprinted in* 1976 U.S.C.C.A.N. 6238 at 6270. Wisconsin's statute is virtually identical to many state statutes authorizing flow control that were adopted after passage of RCRA. Since the passage of RCRA, at least 24 states have enacted legislation authorizing flow control ordinances as part of their solid waste management plans. Pet. Br. at 14, n.1.

[12] *See, e.g., Economic and Institutional Barriers to Private Investment in Resource Conservation and Recovery, Symposium on Resource Conservation and Recovery: Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce*, 94th Cong., 2d Sess. (1976) (focusing on the economic feasibility of municipal financing of waste disposal facilities and the importance of guaranteed waste flows) at 95, 105, 107-8, 110 (statements of Ronald Schwegler, Stephen Lewis, John Bereny and Robert Aldrich) ("[I]n order to get the facility built the bondholders require community delivery requirements or community delivery contracts.") *See also* H.R. Rep. No. 1491, *reprinted in* 1976 U.S.C.C.A.N. at 6246 (topics discussed at symposium).

flow control ordinances, and municipalities issued revenue bonds backed by wastestream guarantees. This transaction structure is now the accepted structure of municipal solid waste facility financing.

As compiled by Securities Data Corporation, the market for financing solid waste management facilities in the United States has accounted for the issuance of $24,371,920,000 in municipal bonds since 1980 to pay for the construction of such facilities. Invalidating local flow control would adversely affect the ability of municipalities to construct solid waste facilities because it would impair their ability to finance them.

With respect to prospective transactions, *amici* are fully aware that the mere threat of invalidating flow control has already impeded the planning process undertaken by municipalities in advance of the actual construction of their solid waste management facilities.[13] The lack of certainty regarding flow control has made it difficult if not impossible for municipal officials to develop and implement realistic solid waste management plans for the disposal of solid waste.

[13] In Minnesota, where a flow control ordinance was recently invalidated under federal commerce clause grounds in *Waste Systems Corp v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993), the Minnesota County of Winona is reevaluating its solid waste plans as a result of the decision. The County currently ships its waste to landfills as far away as Chicago. The County planned to use a flow control ordinance to gain control of the waste flowing out of state in order to build an environmentally beneficial composting facility. The County is now reevaluating its plans to determine whether the facility can be made viable without flow control. *See* Julie Forster, "Down in the Dump," *Winona Daily News*, March 18, 1992, at 1. In the meantime, the County's solid waste is currently being disposed of under the worst solid waste management option (landfilling) while plans to employ beneficial recycling through composting are put on hold or cancelled.

Contrary to the claims of the Petitioners, the primary purpose of flow control from the financing perspective is not to enhance the economic fortunes of the municipality enacting the statute.[14] The purpose of flow control in this context is to ensure that a guaranteed revenue stream is available to repay bondholders, thereby assuring the viability of a solid waste management system.

II. UNDER THE BALANCING CRITERIA, ALTERNATIVES TO FLOW CONTROL DO NOT PRODUCE EQUAL RESULTS

Under the *Pike v. Bruce Church* balancing criteria, if, as here, a legitimate local purpose is found, the Court must balance the nature of the state interest with the impact on commerce, and consider whether the state "interest could be promoted as well with a lesser impact on interstate activities." 397 U.S. at 124. While alternatives to flow control are available, they do not work "as well" as flow control.[15]

Municipalities attempting to solve the real world problem of solid waste disposal have only a few alternatives that might adequately substitute for legal flow control. Rather than compelling the delivery of solid waste to a

[14] Petitioners make much of the counterintuitive, if not absurd proposition that "localities that have adopted flow control laws rightly see trash as a resource that generates revenue, and the localities seek to hoard it for their own benefit." Pet. Br. at 15. Trash is not a *resource* to a municipality; it is a health and safety *problem* that the municipality must pay to get rid of. It does not produce revenue *for the municipality*; it produces revenue to *repay the bondholders*. It does not produce a *"benefit"* for the municipality; it produces a massive debt in the form of bonds issued to finance facilities to properly dispose of the waste.

[15] *Amici* ask the Court to note that while *amici* are part of the waste disposal industry, they are also involved in interstate commerce and are not troubled by flow control. Clearly, the waste disposal industry does not speak with one voice in this matter. *Amici* view flow control as part of the solution to the solid waste problem, not part of the problem.

planned destination by ordinance, municipalities can attempt to obtain a similar, if less precise, result from a waste flow perspective, by reducing the fee charged at municipal facilities to a below-market rate, and, at the same time, increasing taxes on constituents to pay for the shortfall. Solid waste haulers, given the option of paying a market rate for disposal or delivering their solid waste to a facility that charges little or no fee will always select the lower cost alternative.

"Economic flow control," as this structure is often called, is not as effective as legal flow control and does not lessen the burden on interstate commerce. *Economic flow control is less efficient than legal flow control.* Facilities equipped with up-to-date environmental controls will be more expensive to build and operate. Forcing municipalities to supplement disposal costs at their own facility with tax dollars in order to meet a lower price that might be charged by a less environmentally advanced facility, actually penalizes municipalities for complying with more stringent state environmental laws. Pricing under long-term contracts is likely at times to be higher than that charged in the short-term market. Competitive pricing again penalizes a community for seeking long-term solutions to their garbage problems. Moreover, under economic flow control, waste disposal fees are tax-based rather than volume-based. The link between the service and amount paid for the service is stretched to the point of breaking. Under legal flow control, the amount charged for disposal is directly related to the amount of solid waste disposed. Legal flow control results in a more efficient allocation of resources because it better reflects the aggregate social cost of solid waste management.[16]

[16] Petitioners state that flow control is inconsistent with waste-to-energy. Pet. Br. 34-35. One of *amici*, Ogden Projects, Inc., is the nation's leading provider of waste-to-energy facilities with 28 facilities operating or under construction. All but two are supported by legal flow control statutory schemes.

The taxes typically used to finance economic flow control are subject to practical as well economic and political limitations. As a practical matter, local governments have little flexibility to adjust taxes to meet a rapidly changing solid waste market. Tax levies and budgets for expenditures are typically set once per year. Even if a municipality could set a competitive tipping fee, it does not have the flexibility to keep the fee competitive (in response to the competition lowering *its* tipping fee) without depleting the municipal treasury of funds budgeted for other critical municipal services (*e.g.*, police, fire and schools). It is difficult to set an appropriate tipping fee. Too high a fee may cause the waste to go to competing sites. Too low a fee would cause additional waste from other sites to come in, creating sizing problems and resulting in a municipality's taxes subsidizing the waste disposal activities of others. It is politically difficult either to increase general taxes or add a line item tax to a citizen's tax bill in an era when most citizens already feel over-taxed.[17] Citizens who know that they are paying increased taxes for the disposal of their solid waste are less likely to participate in recycling and other waste reduction practices because they know that it will not have an effect on their personal finances.

Another alternative would have the municipality take over the entire function of collecting and disposing of solid waste. But this has significant disadvantages, too. The capital investment in collection trucks and transfer vehicles may be beyond the means of the community, and the staff needed to collect the waste would add significant costs of operation. Alternatively, it could contract with

[17] While it is true that two of the nation's wealthiest jurisdictions (Montgomery County, Maryland and Palm Beach, Florida, as described at Pet. Br. at 28-29) have sufficient revenues to pay for economic flow control, not all jurisdictions have the same resources. Certain of *amici* are involved in both of the described transactions. Both jurisdictions instituted economic flow control because of fear of lawsuits such as the instant case.

a single collection firm to collect all waste in the community on the condition that the collection firm bring all waste to the designated facility. But either of these actions would further reduce competition by extending the municipal monopoly to hauling, an area of less environmental concern.

The impact on interstate commerce of any of these alternatives is the same as flow control. A municipality's waste will end up in the municipality's disposal facility under both alternatives; and hence none of these options provide any reduced burden on interstate commerce. There are no alternatives that serve the local interest "as well with a lesser impact on interstate activities."

III. LOCAL FLOW CONTROL DOES NOT IMPACT INTERSTATE COMMERCE BECAUSE IT IS A PURELY LOCAL SOLUTION TO A LOCAL PROBLEM

Under Respondent's ordinance, all garbage which *comes to rest* within Respondent's borders must be taken for disposal to the town-designated facility. As such, the ordinance takes effect before interstate commerce commences (or, in the case of Petitioners' activities, commences again). This Court has recognized that an ordinance "however drastically it may affect interstate commerce, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs." *Parker v. Brown*, 317 U.S. 341, 361 (1943). Respondent has amply briefed this topic, and *amici* support this analysis.

Moreover, as in *Parker v. Brown*, a municipality is here confronted with "a problem local in character" that urgently demands local action to resolve. *Id.* at 363.

The responsibility for resolving garbage disposal problems has been placed wholly on local municipalities by tradition or state statute, as recognized by this Court, and kept there by Congress. As this Court has stated:

> [It is] a *controlling obligation of the city, which it could not properly ignore,* to protect the health of its people in all lawful ways having relation to that object; and if, in its judgment, fairly and reasonably exercised, the presence of garbage and refuse in the city . . . would endanger the public health by causing spread of disease, then it could rightfully require such garbage to be removed and disposed of, even if it contained some elements of value.

Gardner v. Michigan, 199 U.S. 325 (1905) (emphasis added). In RCRA, Congress specifically declined to remove the responsibility for local collection and disposal of garbage from municipalities, stating "the collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies." 42 U.S.C. § 6901(a)(4). RCRA created a comprehensive regulatory system for managing the nation's hazardous waste but left the responsibility for managing solid waste to state and local authorities. This Court has recognized that the states have a "substantial interest in . . . easing solid waste disposal problems." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 473 (1981). States traditionally delegate ultimate garbage disposal responsibilities to municipalities. *See supra,* n.1, *Facing America's Trash* at 348.

Respondent's solution to its garbage problem accords with the Court's reasoning in *Parker v. Brown* that "[t]here may be . . . local regulations whose effect on interstate commerce is such as not to conflict with but to coincide with a policy which Congress has established with respect to it." *Parker,* 317 U.S. at 363; *Cities Service Gas Company v. Peerless Oil & Gas Company,* 340 U.S. 179, 188 (1950) (where state and national interests coincide, local regulations governing a legitimate local problem survive Commerce Clause scrutiny). In RCRA, Congress declared its preference for local solutions to local garbage disposal problems. 42 U.S.C. § 6901(a)(4) (1988). Congress also expressed its preference for comprehensive

local solid waste management plans, including recycling and development of long-term solid waste disposal facilities. 42 U.S.C. §§ 6942-43 (1988). In response to its purely local problem, and to fulfill its delegated local responsibilities, Respondent in this case developed a local solution, consistent with congressional policy on local municipal waste disposal.

CONCLUSION

The court below held that the Respondent's flow control law was consistent with the Commerce Clause of the United States Constitution. For all the reasons stated above, *amici* urge this Court to uphold the conclusion that municipalities are free to adopt flow control statutes to fulfill their municipal obligation to dispose of garbage safely and efficiently.

Respectfully submitted,

ROBERT C. BERNIUS *
DEXTER EWEL
NEAL J. CABRAL
NIXON, HARGRAVE, DEVANS & DOYLE
One Thomas Circle, N.W.
Washington, D.C. 20005
(202) 457-5300

JEFFREY R. HOROWITZ
OGDEN PROJECTS, INC.
40 Lane Road
Fairfield, NJ 07007
(201) 882-9000

* Counsel of Record

No. 92-1402

Supreme Court, U.S.
FILED
AUG 23 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

C & A CARBONE, INC., RECYCLING PRODUCTS OF ROCKLAND, INC., C & C REALTY, INC., and ANGELO CARBONE,

Petitioners,

—v.—

TOWN OF CLARKSTOWN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT OF THE STATE OF NEW YORK

BRIEF FOR THE STATE OF NEW YORK, THE CITY OF NEW YORK, and THE NEW YORK ASSOCIATION OF COUNTY ATTORNEYS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

ROBERT ABRAMS,
Attorney General of the State of New York
JERRY BOONE,
Solicitor General
ANDREA GREEN,
Deputy Solicitor General
JOHN J. SIPOS,*
GORDON J. JOHNSON,
Assistant Attorneys General
120 Broadway
New York, New York 10271
(212) 416-8473

Attorneys for the State of New York

* *Counsel of Record*

(Counsel continued on inside front cover)

BEST AVAILABLE COPY

O. PETER SHERWOOD,
Corporation Counsel of the City of New York
LEONARD J. KOERNER,
Chief Assistant Corporation Counsel
ELIZABETH ST. CLAIR,
HILARY BREST,
MARJORIE FOX,
ROBERT ORLIN,
Assistant Corporation Counsel
100 Church Street
New York, New York 10007

Attorneys for the City of New York

JONATHAN WOOD,
Assistant County Attorney
Tompkins County Attorney Office
125 East Court Street
Ithaca, New York 14850
MARTIN GOLD
LOUIS A. EVANS
Brown & Wood
One World Trade Center
New York, New York 10048

Attorneys for the New York State Association of County Attorneys

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a local law requiring the delivery of all trash within a town to a designated local transfer facility violates the Commerce Clause of the United States Constitution.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

FACTUAL AND STATUTORY BACKGROUND 3

A. GARBAGE CAN ENDANGER HEALTH AND THE ENVIRONMENT 4

B. FEDERAL AND STATE ENVIRONMENTAL REGULATION 6

1. THE RESOURCE CONSERVATION AND RECOVERY ACT 6

2. NEW YORK STATE'S COMPREHENSIVE SOLID WASTE MANAGEMENT STATUTES 8

C. FLOW CONTROL PROMOTES MANY COMPELLING BENEFITS 10

D. THE CLARKSTOWN TRANSFER STATION PROTECTS THE COMMUNITY'S HEALTH AND ENVIRONMENT 15

1. THE CLARKSTOWN LANDFILL 15

2. CLARKSTOWN'S TRANSFER STATION AND PETITIONERS' FACILITY 15

ARGUMENT 17

FLOW CONTROL PROVIDES SUBSTANTIAL LOCAL BENEFITS WITHOUT RESTRICTING INTERSTATE COMMERCE 17

A. THE PURPOSE OF THE COMMERCE CLAUSE 17

B. STANDARD OF REVIEW 17

C. THE STRICT SCRUTINY TEST IS INAPPLICABLE 19

D. UNDER THE *PIKE* BALANCING STANDARD, THE ORDINANCE IS VALID 21

E. GIVEN THE COMPELLING NON-ECONOMIC INTERESTS FOSTERED BY THE ORDINANCE AND THE ABSENCE OF OTHER ALTERNATIVES, THE TOWN ORDINANCE IS CONSTITUTIONAL UNDER EITHER STANDARD OF REVIEW 25

CONCLUSION 29

TABLE OF AUTHORITIES

Cases PAGE

A.A. Mastrangelo, Inc., v. Commissioner of Dept. of Environmental Protection, 90 N.J. 666, 449 A.2d 516 (N.J. 1982) 28

Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).... 18, 20

Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).... 17, 19

B.F. Goodrich Co. v. Murtha, 958 F.2d 1192 (2d Cir. 1992)..... 14

Browning-Ferris Industries of Tennessee, Inc. v. Metropolitan Government of Nashville and Davidson County, 1991 WL 219383 (Tenn. Ct. App. Oct. 30, 1991), appeal denied (Feb. 24, 1992) 28

California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306 (1905)..... 10, 23

Central Iowa Refuse Systems Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985) 11, 13

Chemical Waste Management, Inc. v. Hunt, — U.S. —, 112 S.Ct. 2009 (1992)..... 19

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987)..... 19

Environmental Defense Fund, Inc. v. Costle, 439 F. Supp. 980 (E.D.N.Y. 1977) 5

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 17, 20

PAGE

Filiberto Sanitation, Inc. v. New Jersey Dept. of Environmental Protection, 857 F.2d 913 (3d Cir. 1988)..... 14, 21-22, 28

In re Fiorillo Bros., 242 N.J. Super. 667, 577 A.2d 1316 (N.J. Super. 1990)..... 22

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Environmental Natural Resources, — U.S. —, 112 S.Ct. 2019 (1992)..... 6, 9, 21, 25

Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928)..... 26

Gardner v. Michigan, 199 U.S. 325 (1905)..... 11, 23

Harvey & Harvey, Inc. v. Delaware Solid Waste Auth., 600 F.Supp. 1369 (D. Del. 1985)..... 22

Hughes v. Oklahoma, 441 U.S. 322 (1979)..... 19

Hunt v. Washington State Apple Advertising Comm., 432 U.S. 333 (1977) 17, 18, 20

Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960) 18, 21, 24

Hybud Equipment Corp. v. Akron, 654 F.2d 1187 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*, 742 F.2d 949 (1984), *cert. denied*, 471 U.S. 1004 (1985) 12, 13, 22

Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662 (1981) 21

Maine v. Taylor, 477 U.S. 131 (1986) 18, 25, 28, 29

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 17, 18, 20, 21, 24

PAGE

Northside Sanitary Landfill, Inc. v. Indianapolis, 902 F.2d 521 (7th Cir. 1990) 14

Parker v. Brown, 317 U.S. 341 (1943)..... 17, 23, 25, 28

Pennsylvania v. West Virginia, 262 U.S. 553 (1923) 29

Philadelphia v. New Jersey, 437 U.S. 617 (1978) . 17, 19, 20, 21, 29

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) ... 18, 26, 27

South Carolina State Highway Department v. Barnwell Brothers, 303 U.S. 177 (1938) 21

South Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82 (1984)..... 26

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982)..... 21

Swin Resource Systems, Inc. v. Lycoming County, Pa., 883 F.2d 245 (3d Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990) 23

Toomer v. Witsell, 334 U.S. 385 (1948) 26-27

Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) ... 11

In re Washington Public Power Supply System Securities Litigation, 720 F. Supp. 1379 (D.Ariz. 1989), *aff'd*, 955 F.2d 1268 (9th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 408 (1992)..... 13

In re Waste Disposal Agreement, 237 N.J. Super. 516, 568 A.2d 547, *cert. denied*, 121 N.J. 647, 583 A.2d 337 (1990) 22, 23, 29

Waste Systems v. County of Martin, 985 F.2d 1381 (8th Cir. 1993) 28

West v. Kansas Natural Gas Co., 221 U.S. 229 (1911) .. 17, 29

PAGE

Constitution

Federal

U.S. Const. art. I, § 8, cl.3 ..... *passim*

New York State

NY Const. art. IX, § 2(c)(10)..... 23

Statutes

Federal

Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* 14

Resource Conservation and Recovery Act, 42 USC § 6901, *et seq.*:

RCRA § 1002(a)(4), 42 U.S.C. § 6901(a)(4)..... 6
RCRA § 1003, 42 U.S.C. § 6902..... 7
RCRA § 4001, 42 U.S.C. § 6941 ..... 7, 24
RCRA § 4003(a)(2), (5), 42 U.S.C. § 6943(a)(2), (5) .. 7-8
RCRA § 4005, 42 U.S.C § 6945 7

New York State

Environmental Conservation Law

ECL § 27-0101(2)..... 8
ECL § 27-0103..... 8
ECL § 27-0106(1) 9, 11, 24
ECL § 27-0107..... 8
ECL § 27-0107(1)(b)(i)..... 15
ECL § 27-0405(2)(a)..... 15
ECL § 27-0704(5)..... 5
ECL § 27-0711..... 8

PAGE

Laws of New York

L. 1976, c. 913 9
L. 1977, c. 425, § 6 8
L. 1979, c. 509 9
L. 1979, c. 510 9
L. 1980, c. 552, § 1 8
L. 1980, c. 552, § 1(a) 8
L. 1980, c. 552, § 1(b) 8
L. 1980, c. 552, § 1(b)(2) 8
L. 1980, c. 560 9
L. 1981, c. 932 9
L. 1982, c. 632 9
L. 1982, c. 675 9
L. 1983, c. 502 9
L. 1983, c. 513 9
L. 1983, c. 930 9
L. 1984, c. 638 9
L. 1985, c. 478 9
L. 1985, c. 670 9
L. 1985, c. 697 9
L. 1985, c. 797 9
L. 1986, c. 627 9
L. 1986, c. 840 9
L. 1986, c. 936 9
L. 1987, c. 71 9
L. 1987, c. 485 9
L. 1987, c. 747 9
L. 1987, c. 773 9
L. 1988, c. 70, § 2 12
L. 1988, c. 627 9
L. 1988, c. 665 9
L. 1988, c. 667 9
L. 1988, c. 670 9
L. 1989, c. 80 9
L. 1989, c. 726 9

PAGE

L. 1991, c. 369 10
L. 1991, c. 540 10
L. 1991, c. 569 ..... 9-10, 11
L. 1991, c. 631 10
L. 1992, c. 252 10
L. 1992, c. 350 10
L. 1992, c. 369 10
L. 1992, c. 391 10
L. 1992, c. 567 10
L. 1992, c. 629 10

Other States

Colo. Rev. Stat. § 30-20-107 11

Conn. Gen. Stat. § 22A-220A 11

Del. Code Ann. tit. 7 § 6406 (31) (1991) 11

D.C. Code § 6-507 11

Fla. Stat. §§ 403.7063, 403.713 (1986 and Supp. 1992) . 11

Haw. Rev. Stat. § 340A-3(a) 11

Ill. Ann. Stat. c. 34 P 5-1047 11

Ind. Code §§ 36-9-31-3 & 4 11

Iowa Code § 28G.4 11

La. Rev. Stat. 30:2307 (9) 11

Me. Rev. Stat. Ann. tit. 38, § 1304-D (West 1989 and Supp. 1991) 11

Minn. Stat. § 1158.80 (1990 and Supp. 1991) 11

Miss. Code Ann. § 17-17-319 11

Mo. Rev. Stat. § 260.202 11

N.C. Gen. Stat. § 130A-294 11

PAGE

N.D. Cent. Code §§ 23-29-06 (6) & (8) 11

N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5 11

Ohio Rev. Code Ann. § 343.01 (H)(2) 11

Or. Rev. Stat, § 268.317 (3) & (4) 11

Pa. Stat. Ann. tit. 53, § 4000.303(e) 11

R.I. Gen Laws § 23-19-10(40) 11

Tenn. Code Ann. 68-211-814 11

Vt. Stat. Ann. tit. 24, §§ 2203a, 2203b 11

19 V.I.C. § 1570f 11

Va. Code Ann. § 15.1-28.01 11

Wash. Rev. Code §§ 36.58.040, 35.21.120 11

W. Va. Code S 240-2-1h 11

Wis. Stat. § 159.13 (3), (11) 11

Regulations

Federal

43 Fed. Reg. 26611 (1978) 5
56 Fed. Reg. 51009 (1991) 6
40 C.F.R. § 503 6
40 C.F.R. § 256.30 13
40 C.F.R. § 256.31 13

New York State

6 NYCRR Part 360 6

PAGE

Legislative Materials

S. Rep. No. 988, 94th Cong., 2d Sess. (1976) 4

Interstate Transport and Disposal of Solid Waste: Hearing Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works, 101st Cong., 2d Sess. (1990) 4

S. 2877, 102d Cong., 2d Sess. (1992) 29

H.R. Rep. No. 1491, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6238 .....4-7, 11, 13

Staff of the House Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., *Materials Relating to the Resource Conservation and Recovery Act of 1976* 4

Miscellaneous

Brunner, Hubbard, Keller & Newton, *Closing Open Dumps* (EPA 1971) 5

Ferrand, *Records of the Federal Convention* 29

S. Lieberman, *Abandoned Trash in West Virginia is Traced to Local Carbone Site*, Rockland Journal-News, July 26, 1991 at B3 24

D. McClendon, *Radioactive Waste Is Held in Limbo*, Rockland Journal-News, May 17, 1993 at B1 24

Mulvey, "Cost Guidelines for the Recycling Option," *printed in, Selected Papers from the 1989 Conference on Solid Waste Management and Materials Policy* (New York State Legislative Commission on Solid Waste Management, 1989) 14

PAGE

U.S. Congress, Office of Technology Assessment, *Facing America's Trash: What Next for Municipal Solid Waste* (1989) 10

U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action* (1989) ..10, 12, 13, 28

Office of Solid Waste, U.S. Environmental Protection Agency *Characterization of Municipal Solid Waste in the United States: 1990 Update* (1990) 4

Office of Solid Waste, U.S. Environmental Protection Agency *Characterization of Municipal Solid Waste in the United States: 1992 Update* (1992) 4, 14

INTEREST OF *AMICI CURIAE*

Amici curiae, the State of New York, the City of New York, and the New York State Association of County Attorneys, submit this brief in support of respondent Town of Clarkstown seeking affirmance of the lower court's order in *C & A Carbone, Inc. v. Town of Clarkstown*, 182 A.D.2d 213, 587 N.Y.S.2d 681 (N.Y. App. Div. 1992), *leave to appeal denied*, 80 N.Y.2d 760, 591 N.Y.S.2d (N.Y. 1992).

Flow control ordinances are a vital component of solid waste management throughout New York. New York State has authorized 38 localities and solid waste management units to enact flow control laws so that they can fulfill their responsibility for safe, environmentally-sound management of solid waste. New York City may impose flow control to implement a large-scale food composting program. Many counties throughout the State already rely on flow control as an integral part of their solid waste management plans.

Petitioners ask the Court to invalidate a flow control ordinance that allows a local government to fulfill its obligation to protect the environment and the health of its citizens by managing garbage safely and efficiently. Petitioners' argument, if accepted, will have a devastating impact on the ability of states and localities to address their serious solid waste problems.

There are many types of flow control, each promoting compelling government interests. The flow control ordinance at issue in the instant case, for example, requires that all waste from the Town of Clarkstown be delivered to a transfer station. Other flow control ordinances require delivery of recyclable or compostable materials to a central location. For example, New York City is considering a composting program for food wastes from food stores, restaurants, and institutions. The New York City Health and Hospital Corporation is also developing a program to recycle the plastic components of regulated medical waste. If promulgated, flow control regulations would enable both of these programs to direct recoverable wastes to

recycling or composting facilities developed by the City. Such programs also will reduce the amount of waste disposed of through the less-preferred method of landfilling.

Amici urge the Court to recognize the extremely important public policy goals that are served by the use of various flow controls to address the solid waste crisis and to hold that flow control—as anticipated by Congress in RCRA and as already implemented by more than half the States in the nation—is a constitutionally permissible exercise of the local police power justified by the compelling health and safety benefits that it provides.

SUMMARY OF ARGUMENT

A growing number of states and localities ensure environmentally-sound disposal by directing garbage to a specified solid waste management facility, one which can safely separate or dispose of garbage. Such direction or "flow control" ordinances promote many compelling interests. They: 1) contribute to recycling and energy recovery; 2) reduce solid waste; 3) counter the commingling of hazardous waste; 4) provide a stable financial base for state-of-the-art solid waste management facilities and technologies; 5) ensure that garbage is handled and disposed at an environmentally-sound facility; 6) reduce truck traffic; 7) minimize CERCLA clean-up cost liability; and 8) provide necessary and accurate data on which to base an effective management plan. And while such ordinances promote modern solid waste management strategies, municipal direction of garbage is not a new idea; its history dates back 90 years.

Given these compelling benefits and the responsibility of state and local governments to ensure the safe disposal of garbage and to protect health and environment, flow control ordinances, including the Clarkstown ordinance, do not violate the Commerce Clause. In light of these benefits, the Ordinance's evenhanded nature, and the burdens imposed on Town

residents, the Court should apply the balancing test set forth in *Pike v. Bruce Church* and *Minnesota v. Clover Leaf Creamery*. Furthermore, given the absence of viable alternatives, the Ordinance does not violate the Commerce Clause even under the strict scrutiny test of *Philadelphia v. New Jersey* and *Maine v. Taylor*.

FACTUAL AND STATUTORY BACKGROUND

In the midst of the bicentennial celebration of America's past, Congress recognized that the nation's future was endangered by serious health, safety, and environmental problems resulting from garbage disposal, and enacted the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 *et seq*. Recognizing that local governments historically had responsibility for solid waste collection and disposal, RCRA required States and localities to implement environmentally-sound disposal practices. In turn, state and local governments initiated various efforts to reduce the health and environmental hazards.

Waste collection and disposal is a quintessential local responsibility. Consistent with their historic responsibility, numerous localities across New York State have closed their unsafe landfills, arranged for the construction of centrally-located, state-of-the-art solid waste management facilities, and directed that all garbage be delivered to those facilities.

Localities such as Clarkstown do not adopt flow control ordinances in a vacuum. State, County, and Town solid waste management programs, of which flow control ordinances are but a part, are the culmination of the growing scientific awareness of the potential hazards associated with garbage disposal and the development of federal and state solid waste regulations. In the present case, it was only after the New York State Department of Environmental Conservation ("DEC") ordered Clarkstown to close its landfill that the Town arranged for the construction of the transfer station and required that all garbage be delivered

there. To properly understand Clarkstown's ordinance it is necessary to acknowledge those hazards, the evolution of environmental laws governing waste disposal, and the benefits secured by modern solid waste management facilities and flow control ordinances.

A. GARBAGE CAN ENDANGER HEALTH AND THE —ENVIRONMENT

Every day, Americans generate 500,000 tons of solid waste. The national volume grew from 88 million tons per year in 1960 to nearly 200 million tons per year in 1990. During the same time, per capita generation of municipal solid waste increased from 2.7 pounds per person per day to 4.3 pounds. The problem of ever-increasing volumes of garbage is compounded by continually shrinking disposal capacity.[1] For example, America's fifty largest cities have exhausted or will soon exhaust their landfill capacity, and in the next ten years, 80% of the currently-operating landfills will close.[2]

Waste disposal can pose health and environmental hazards. For example, decaying landfilled garbage produces leachate, which contains various chemical elements and compounds, including heavy metals, some of which are toxins, and volatile organic compounds ("VOCs"). Oftentimes, leachate seeps into surface or groundwater and can thereby degrade or ruin a community's water supply. Groundwater pollution can have dire and widespread consequences since nearly 50% of Americans depend on groundwater for drinking water.[3] Such contamination requires extensive and expensive cleanup measures. Sometimes it is irreversible.[4]

In the present case, leachate from Clarkstown's landfill migrated into the surrounding ground and surface water, and "present[ed] a significant threat to the public health [and] the environment" according to the DEC. R. 203. The Clarkstown site is not unique. For instance, the New York State Legislature has required the closure of all Long Island landfills without double liners because they threaten to contaminate irreversibly the aquifer that provides drinking water for the region's 2.5 million inhabitants. ECL § 27-0704(5); *see* 43 Fed. Reg. 26611 (1978) (EPA determination of vulnerability).

Decaying garbage also produces methane gas emissions. If not properly managed, methane can ignite, killing people and destroying buildings. H.R. Rep. 94-1491 at 37-8, *reprinted in* 1976 U.S.C.C.A.N. at 6275-6. The recent explosion at the Frisbee Avenue housing development in Albany demonstrates methane's potentially sinister consequences. Also, in March 1992, the fire from a methane explosion at the Camillus, New York landfill took several weeks to extinguish.

In addition, fires at landfills can spew clouds of particulates and incompletely burned gases and can contribute to human respiratory diseases, darken the skies, cause additional surface and groundwater contamination, and interfere with air and surface transportation. Like methane explosions, landfill fires have resulted in fatalities. H.R. Rep. 94-1491 at 37-8; *see* Brunner, Hubbard, Keller & Newton, *Closing Open Dumps* 2 (EPA, 1971).

---

[1] *See* Office of Solid Waste, U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update*, ES-9, ES-13 (1990); *id.*, *1992 Update*, ES-3 (1992).

[2] S. Rep. No. 988, 94th Cong., 2d Sess. 1 (1976); H.R. Rep. No. 1491, 94th Cong., 2d Sess. 9 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6247; *see Interstate Transport and Disposal of Solid Waste: Hearing Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 101st Cong., 2d Sess. 2 (1990).

[3] *See* Staff of the House Subcomm. on Transportation and Commerce of the House Comm. on Interstate and Foreign Commerce, 94th Cong., 2d Sess., *Materials Relating to the Resource Conservation and Recovery Act of 1976*, at 26, 39 (1976); H.R. Rep. No. 1491, 94th Cong., 2d Sess. 89-90 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 6325.

[4] *Environmental Defense Fund, Inc. v. Costle*, 439 F. Supp. 980, 986, n. 3 (E.D.N.Y. 1977) (noting that if Long Island's aquifer became polluted "it would take as long as 3,000 years for [it] to be flushed clean").

Each of the above health and environmental dangers increases geometrically when generators, haulers, or landfill operators improperly dump hazardous waste into municipal solid waste landfills.[5] Faced with these hazards and given the responsibility for protecting health and the environment, states and localities now are constructing and upgrading solid waste facilities to handle solid waste in an environmentally-sound and reliable manner. Few would deny that "[t]he modern landfill is a technically complex engineering exercise that comes replete with liners, leachate collection systems and highly regulated operating conditions." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dept. of Natural Resources*, — U.S. —, —, 112 S.Ct. 2019, 2030 (1992) (Rehnquist, C.J., and Blackmun, J., dissenting); *see* 56 Fed. Reg. 51009 (1991). Compost operations, waste-to-energy facilities, recycling centers, and transfer stations are similarly complex. *See* 40 C.F.R. § 503; 6 New York Codes Rules and Regulations §§ 360-3, 360-4, 360-5, 360-11, 360-12.

B. FEDERAL & STATE ENVIRONMENTAL REGULATION

1. The Resource Conservation and Recovery Act

Congress enacted RCRA, in part, to address the health and environmental problems caused by unsafe solid waste disposal facilities, unsound disposal practices, and weak regulation. Traditionally, responsibility for garbage collection and disposal has been vested in state and local governments as part of their general police powers. Under RCRA, states and localities retain that responsibility. RCRA § 1002 (a)(4), 42 U.S.C. § 6901 (a)(4). Accordingly, one of RCRA's central objectives was to:

[5] *See* H.R. Rep. 94-1491 at 17-23, *reprinted in* 1976 U.S.C.C.A.N. at 6255-61 (containing specific examples from across the country of the dumping of hazardous waste in landfills and the resulting damage caused by migrating leachate).

> providf]e] technical and financial assistance to State and local governments and interstate agencies for the development of solid waste management plans (including resource recovery and resource conservation systems) which will *promote* improved solid waste management techniques (including more effective organizational arrangements), *new and improved methods of collection, separation, and recovery of solid waste, and environmentally safe disposal of nonrecoverable residues.*

RCRA § 1003, 42 U.S.C. § 6902 (emphasis added); *see* RCRA § 4001, 42 U.S.C. § 6941.

As part of the overall strategy to ensure recycling, energy recovery, resource conservation, and environmentally-sound disposal, Congress recognized the need for new, environmentally-sound solid waste management facilities and required the closure of unsafe landfills. RCRA § 4005, 42 U.S.C. § 6945. Congress also recognized that guaranteed waste streams could help finance innovative resource recovery facilities, such as recycling, composting, and waste-to-energy facilities, and that prohibitions against long-term agreements for supplying garbage would forestall the construction of such facilities and thereby threaten effective solid waste management planning. H.R. Rep. 94-1491 at 34, *reprinted in* 1976 U.S.C.C.A.N. at 6272. To qualify for federal funding, each state plan

> (2) . . . shall . . . prohibit the establishment of new open dumps within the State and contain the requirement that all solid waste (*including solid waste originating in other states*. . .) shall be (A) utilized for resource recovery or (B) disposed of in sanitary landfills . . . or otherwise disposed of in an environmentally sound manner;
>
> . . . .
>
> (5) . . . shall provide that no local government within the state shall be prohibited under state or local law from entering into long-term contracts for the supply of solid waste to resource recovery facilities . . . .

RCRA § 4003 (a)(2), (5) (emphasis added)[6]. By abolishing prohibitions against long-term contracts, Congress freed local governments to develop long-range plans and to conclude long-term contracts for waste streams thereby encouraging localities to move beyond mediocre, interim facilities. The requirement that *all* solid waste within a state be recycled or disposed of in a safe manner coupled with the ability to enter into long-term contracts thus provided strong incentives for local governments to control their waste streams and to develop solid waste management facilities that provide a safe and long-term solution to the solid waste crisis.

2. New York State's Comprehensive Solid Waste Management Statutes

Much of New York State's solid waste management law, ECL Title 27, was enacted in response to RCRA.[7] Like Congress, the New York State Legislature found "that unwanted residues of our society have polluted many of our land and water resources, while at the same time depleting our finite stock of natural resources." L. 1980, c. 552, § 1. Consistent with traditional responsibilities, the statute provides that localities and counties have primary responsibility for solid waste management. ECL §§ 27-0101(2); 27-0107; 27-0711.

Title 27 promotes the development of new, environmentally-sound solid waste management facilities as well as the implementation of a comprehensive solid waste management plan in accordance with RCRA. L. 1980, c. 552, § (1)(a). Also, the statute seeks to eliminate barriers and provide incentives for long-term efficient solid waste management. L. 1980, c. 552,

[6] Subsection (a)(5) was amended by the Solid Waste Disposal Act of 1980 to further ensure that states and localities faced no obstacles in developing long-term commitments for recycling and resource recovery. 42 U.S.C. § 6943 (a)(5).

[7] L. 1977, c. 425, § 6 and L. 1980, c. 552, § (1)(b)(2) both state that New York's solid waste legislation was enacted, in part, to conform to RCRA. *See also* ECL § 27-0103.

§ (1)(b). Consistent with RCRA and EPA regulations, the New York State Legislature established the following solid waste management priorities:

> (a) first, to reduce the amount of solid waste generated;
>
> (b) second, to reuse material for the purpose for which it was originally intended or to recycle material that cannot be reused;
>
> (c) third, to recover, in an environmentally acceptable manner, energy from solid waste that cannot be economically and technically reused or recycled;
>
> (d) fourth, to dispose of solid waste that is not being reused, recycled or from which energy is not being recovered, by land burial or other methods approved by the [DEC].

ECL § 27-0106(1). In order to achieve these goals and recognizing that solid waste management facilities are complex and capital-intensive, the New York State Legislature on 38 separate occasions has granted localities and planning units the authority to control the handling of all solid waste within their jurisdictions.[8] The Rockland County Solid Waste Treatment and

[8] *See* L. 1976, c. 913 (Niagara County); L. 1979, c. 509 (Town of Oyster Bay); L. 1979, c. 510 (Town of North Hempstead); L. 1980, c. 560 (New York City); L. 1981, c. 932 (Onondaga County); L. 1982, c. 632 (Town of Islip); L. 1982, c. 675 (Dutchess County); L. 1983, c. 502 (St. Lawrence County); L. 1983, c. 513 (Washington County); L. 1983, c. 930 (Broome County); L. 1984, c. 638 (North Hempstead Solid Waste Management Authority); L. 1985, c. 478 (Town of Babylon); L. 1985, c. 670 (Jefferson and Lewis Counties); L. 1985, c. 697 (Essex County); L. 1985, c. 797 (Town of Hempstead); L. 1986, c. 627 (Western Finger Lakes Solid Waste Management Authority); L. 1986, c. 840 (Town of Huntington); L. 1986, c. 936 (Ulster County); L. 1987, c. 71 (Warren County); L. 1987, c. 485 (Orleans County); L. 1987, c. 747 (Montgomery, Otsego, and Schoharie Counties); L. 1987, c. 773 (Saratoga County); L. 1988, c. 627 (Oneida and Herkimer Counties); L. 1988, c. 665 (Franklin County); L. 1988, c. 667 (Town of Brookhaven); L. 1988, c. 670 (Essex County); L. 1989, c. 80 (Town of Smithtown); L. 1989, c. 726 (Eastern Rensselaer

Disposal Act, L. 1991, c. 569, authorizes localities in Rockland County, such as the Town of Clarkstown, to require that "all solid waste generated, originated or brought within their respective boundaries . . . shall be delivered to a specified solid waste management resource recovery facility" including a transfer station.

Rockland County has developed a comprehensive solid waste management plan that includes the implementation of a source-separation program for various recyclables, and the development of composting facilities, materials recovery facilities, and an environmentally-sound landfill. The Clarkstown transfer facility plays an integral role in the operation of the County Plan.

C. FLOW CONTROL PROMOTES MANY COMPELLING BENEFITS

Taking responsibility for waste recycling, energy recovery, waste reduction, and environmentally-sound waste disposal requires the ability to direct the flow of waste. Absent such control, state and local efforts to ensure safe and efficient waste disposal will fail. *See* U.S. Environmental Protection Agency, *The Solid Waste Dilemma: An Agenda For Action* 14 (1989); U.S. Congress, Office of Technology Assessment, *Facing America's Trash: What Next for Municipal Solid Waste* 275 (1989).

Flow control is not a recent innovation. Ordinances directing garbage to a specific landfill or hauler are at least 90 years old. In 1905 this Court upheld two such ordinances against takings claims as valid exercises of the police power. *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306

County); L. 1991, c. 369 (Madison County); L. 1991, c. 540 (Fulton County); L. 1991, c. 631 (certain towns in Westchester County); L. 1992 c. 252 (Tompkins County); L. 1992, c. 350 (Greene County); L. 1992, c. 369 (Sullivan County); L. 1992, c. 391 (Greater Troy Solid Waste Management Authority); L. 1992, c. 567 (Town of Riverhead); L. 1992, c. 629 (Westchester County).

(1905); *Gardner v. Michigan*, 199 U.S. 325 (1905). More recently, when Congress enacted RCRA, it recognized that various states and localities already "require all discarded materials be transported to a particular location" and it made clear that the legislation did not interfere with such flow control ordinances. H.R. Rep. 94-1491 at 34. At least twenty-nine states and territories have now adopted flow control ordinances.[9]

Flow control promotes New York State public policy as expressed in ECL § 27-0106, *supra* at 9, by providing at least eight benefits. First, flow control promotes the twin goals of energy recovery and recycling, two cornerstones of federal and state policy. By requiring all solid waste to be delivered to a central location, towns and their agents can ensure—in the most efficient manner possible—that all materials that can be

[9] *See e.g.*, Colorado (Colo. Rev. Stat. § 30-20-107); Connecticut (Conn. Gen. Stat. § 22A-220A); Delaware (Del. Code Ann. tit.7 § 6406 (31) (1991)); District of Columbia (D.C. Code § 6-507); Florida (Fla. Stat. §§ 403.7063; 403.713 (1986 and Supp. 1992)); Hawaii (Haw. Rev. Stat. § 340A-3(a)); Illinois (Ill. Ann. Stat. c. 34 P 5-1047); Indiana (Ind. Code §§ 36-9-31-3 & 4); Iowa (Iowa Code § 28G.4); Louisiana (La. Rev. Stat. 30:2307 (9)); Maine (Me. Rev. Stat. Ann. tit. 38, § 1304-D (West 1989 and Supp. 1991)); Minnesota (Minn. Stat. § 1158.80 (1990 and Supp. 1991)); Mississippi (Miss. Code [illegible]. § 17-17-319); Missouri (Mo. Rev. Stat. § 260.202); New Jersey (N.J. Stat. Ann. §§ 13:1E-22, 48:13A-5); New York (1991 N.Y. Laws, c. 569, at 1687-89); North Carolina (N.C. Gen. Stat. § 130A-294); North Dakota (N.D. Cent. Code §§ 23-29-06(6) & (8)); Ohio (Ohio Rev. Code Ann. § 343.01 (H)(2)); Oregon (Or. Rev. Stat § 268.317 (3) & (4)); Pennsylvania (Pa. Stat. Ann. tit. 53, § 4000.303(e)); Rhode Island (R.I. Gen Laws § 23-19-10(40)); Tennessee (Tenn. Code Ann. 68-211-814); Vermont (Vt. Stat. Ann. tit. 24, §§ 2203a, 2203b); Virginia (Va. Code Ann. § 15.1-28.01); Washington (Wash. Rev. Code § 36.58.040, 35.21.120); West Virginia (W. Va. Code S 240-2-1h); Wisconsin (Wis. Stat. § 159.13(3), (11)); Virgin Islands (19 V.I.C. § 1570f).

Flow control, of course, does not violate the Sherman Act. *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 425 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985); *see Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

removed from the solid waste stream for energy recovery or recycling are indeed removed from the waste stream. Monitors divert recyclable material improperly included in the waste stream and deter improper disposal practices.

Second, flow control promotes the related goal of solid waste reduction, "a key strategy in [New York's] solid waste management policy." L. 1988, c. 70, § 2. By imposing volume-based disposal costs reflective of state-of-the-art technology, flow control ordinances encourage citizens and corporations to reduce the amount of waste they produce. *See Agenda for Action* at 34. Additionally, the removal of all materials from the solid waste stream for energy recovery, composting, and recycling reduces, by definition, the volume of solid waste. Less solid waste translates into fewer health and environmental hazards at downstream landfills.

Third, by funnelling all solid waste to a central location, flow control allows localities to thoroughly monitor the solid waste stream to ensure that hazardous and medical wastes are not commingled with solid waste. Commingling is not a hypothetical problem. Tainted solid waste damages a municipality's reputation, making it more difficult and more expensive to dispose of its solid waste, and increases the health and environmental hazards to those communities that surround compost or landfill facilities as well as to those who work at such facilities. Absent flow control, towns could not check the entire waste stream and intercept commingled waste. Flow control provides an efficient and necessary first line of defense against the commingling of hazardous and medical waste.

Fourth, both Congress and the State Legislature expressly recognized that guaranteed waste streams are crucial to the success of state-of-the-art resource recovery facilities. *See* H.R. Rep. No. 94-1491 at 34. Flow control regulations provide the investment security for such necessary projects. *Hybud Equipment Corp. v. Akron*, 654 F.2d 1187, 1190 (6th Cir. 1981), *vacated on other grounds*, 455 U.S. 931 (1982), *on remand*,

742 F.2d 949 (1984), *cert. denied*, 471 U.S. 1004 (1985). By ensuring a steady, long-term supply of garbage, flow control provisions provide a broad financial base for revenue bonds. Such a secure, long-term foundation makes the solid waste facility an attractive investment. Absent flow control, waste-flight will disrupt and destroy the formation of a secure financial base, and revenue bonds will not be marketable. *See Central Iowa Refuse Systems*, 715 F.2d 419, 422-27; *Hybud*, 654 F.2d at 1190.[10]

In a similar manner, by guaranteeing a waste stream and stabilizing a market, flow control fosters the development of innovative recycling, composting, and energy-recovery technologies. This encouragement of new technologies was clearly contemplated by Congress when it enacted RCRA. H.R. Rep. 94-1491 at 34; *see also* 40 C.F.R. §§ 256.30, 256.31. For example, flow control can assist New York City in developing cutting-edge technology for large-scale composting of food wastes. The inability to utilize flow control will inhibit the development of new technologies and programs as well as the construction of environmentally-sound solid waste management facilities. *See Agenda for Action* at 14.

Fifth, separate and apart from providing the financial base for solid waste management facilities, flow control also ensures that garbage is actually shipped to and disposed of at environmentally-sound facilities. As recognized by Congress and the State Legislature, such facilities are essential if localities are to effectively address the garbage crisis. Flow control helps towns to guarantee that garbage is disposed of at an authorized

[10] In New York, $2 billion in revenue bonds have been issued over the past ten years to finance solid waste management projects. In localities with flow control, approximately $1 billion in revenue bonds are currently outstanding. Any displacement of flow control could undermine such bonds, threaten bondholders' investments, and trigger litigation rivaling the "WPPSS" saga. *See generally In re Washington Public Power Supply System*, 720 F. Supp. 1379 (D. Ariz 1989), *aff'd*, 955 F.2d 1268 (9th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 408 (1992).

facility even if flow control is not needed to finance the facility.

Sixth, flow control helps states and localities avoid financial exposure. Under *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir. 1992), a municipality may be liable for CERCLA clean-up costs incurred at disposal sites where its waste was dumped. *See* 42 U.S.C. § 9601 *et seq*. By directing municipal solid waste to a specific environmentally-sound disposal facility, localities can avoid or minimize such liability. *Northside Sanitary Landfill v. Indianapolis*, 902 F.2d 521 (7th Cir. 1990) (city may concentrate its garbage at a single site given concern about clean-up costs at another site).

Seventh, in the context of transfer stations, flow control can reduce the volume of truck traffic as well as the volume of garbage transported to another facility. Transfer stations reduce waste volume by removing recyclables and then compacting the residue for shipment. Also, by consolidating the contents of several collection trucks for shipment in one larger truck, transfer stations reduce truck traffic. Mulvey, "Cost Guidelines for the Recycling Option," *printed in Selected Papers from the 1989 Conference on Solid Waste Management and Materials Policy* (New York State Legislative Commission on Solid Waste Management, 1989); *Filiberto Sanitation, Inc. v. State of New Jersey Dept. of Environmental Protection*, 857 F.2d 913, 920 (3rd Cir. 1988).

Eighth, by providing municipalities an opportunity to obtain an accurate characterization of their waste streams, flow control provides an indispensable tool for developing a viable, comprehensive solid waste management plan. *Filiberto Sanitation*, 857 F.2d at 920. According to the EPA, the identification of the waste stream's components and volume is an indispensable first step towards solving the problems associated with garbage generation and disposal. Office of Solid Waste, U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992*

Update ES-1 (1992). Similarly, New York statutes require local solid waste management plans to contain, first and foremost, a "characteriz[ation of] the solid waste stream." ECL § 27-0107(1)(b)(i); *accord* ECL § 27-0405(2)(a).

For these reasons, flow control promotes many compelling local, state, and national interests.

D. THE CLARKSTOWN TRANSFER STATION PROTECTS THE COMMUNITY'S HEALTH AND ENVIRONMENT

1. The Clarkstown Landfill

The Clarkstown landfill opened in 1950. In 1980 DEC determined that the landfill constituted a "significant threat to the public health [and] the environment." R. 181, 202-03. Garbage was placed directly into the groundwater, and leachate was seeping into the groundwater and threatening the drinking water. R. 175-76. Therefore, DEC ordered the Town to close the landfill, listed it in the Registry of Inactive Hazardous Waste Disposal Sites, and assessed significant penalties. R. 189, 203. As a result of DEC's enforcement action, the Town agreed to construct a state-of-the-art transfer station that ultimately would form part of a county-wide solid waste management program. A private contractor, Recycling Center Inc. ("RCI"), constructed and operates the transfer station, charging $81 per ton of trash.[11] While petitioners complain about the Town's tipping fee, the difference in operations between their facility and Clarkstown's more than justifies the 15% differential.

2. Clarkstown's Transfer Station & Petitioners' Facility

Petitioners' characterization of the "simpl[e] transfer station," Pet. Br. at 13, masks the complexity of the Clarkstown facility. To gain access, each truck must first pass between two

[11] The Town has an option to purchase the station in 1995.

geiger counters to ensure no radioactive waste is present. Next, a Town employee examines the truck's manifest and weighs the truck. Video cameras record each entry. The transfer station itself is a huge three-story building, with a large bay area inside on the second floor where the solid waste is deposited. Here, Town and RCI employees visually check the waste for the presence of recyclables, hazardous waste, and medical waste. A roof and walls surround the transfer bay and contain blowing litter and unpleasant odors. Workers and machines then segregate recyclable materials such as tires, wood, cardboard, metal, branches, and yard clippings. The tires, metal, and cardboard are shipped to recycling centers. The Town pulverizes the wood and yard clippings and deposits the residue in the Town's compost field, located next door. After the recyclables are separated, machines load the non-recyclable residue into tractor-trailer dump trucks waiting below on the first floor or compress it for other trucks. The tipping fee charged by the Clarkstown facility reflects the cost of the environmentally-sound practices employed at a state-of-the-art facility.

In contrast, petitioners' site has no perimeter fence, no enclosed dumping bay, no enclosed loading area, and no radioactive waste sensors. Also, petitioners' recycling claims ring hollow in light of the police investigation that revealed that petitioners send recyclable material, such as steel rims and truck springs, to landfills and incinerators. R. 50, J.A. 17. Moreover, it appears that petitioners improperly mixed medical waste, including surgical gloves and intravenous feeding bags, with the solid waste. J.A. 17. While petitioners assert that they deal only in non-Clarkstown or non-New York State waste, the police officers' identification of Clarkstown waste at the site of the March 8, 1991 highway accident belies that claim. R. 55-6. Given these practices, it is no surprise that petitioners wish to avoid the inspection regimen of the Clarkstown facility.

ARGUMENT

FLOW CONTROL PROVIDES SUBSTANTIAL LOCAL BENEFITS WITHOUT RESTRICTING INTERSTATE COMMERCE

A. The Purpose of the Commerce Clause

The dormant Commerce Clause acts as a limitation on the states' authority to erect protectionist state barriers that would threaten the operation of the federal union. The Commerce Clause has been construed to preserve our "national solidarity" by preventing states from isolating themselves from problems common to all and fomenting "rivalries and reprisals" similar to those that existed under the short-lived Articles of Confederation. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522-23 (1935); *West v. Kansas Natural Gas*, 221 U.S. 229 (1911). This grant of general power upon Congress to regulate commerce, however, did not preempt the states' police powers. "[I]n the absence of conflicting legislation by Congress, there is a residuum of power in the State to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 350 (1977); *Parker v. Brown*, 317 U.S. 341, 360-61 (1943). Although petitioners apparently view the Commerce Clause as a constitutional antitrust provision, its focus instead is the protection of interstate markets, not particular interstate companies, from unduly burdensome regulations. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 127-128 (1978).

B. Standard Of Review

This Court has developed two standards of review in analyzing Commerce Clause issues. First, economically protectionist regulations, that is, those regulations that discriminate against interstate commerce in favor of in-state interests, are subject to strict scrutiny. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981); *Philadelphia v. New Jersey*, 437

U.S. 617, 624 (1978). A court may find that a state law constitutes "economic protectionism" (1) if the statute differentiates between in-state and out-of-state interests by favoring the former or burdening the latter or (2) if the statute was motivated by a discriminatory purpose. The inquiry into whether or not a discriminatory purpose motivated the statute usually centers on the legislative history behind the enactment. *See Washington Apple*, 432 U.S. 333, 352; *Clover Leaf Creamery*, 449 U.S. at 471, n. 15; *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 269-71 (1984). While in practice, the strict scrutiny standard results in a virtual *per se* rule of invalidity, "[a]s long as a state does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation,' it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources." *Maine v. Taylor*, 477 U.S. 131, 151 (1986) (citation omitted).

Second, in contrast to protectionist regulations, "even-handed" regulations, that is, those regulations that apply equally to in-state and out-of-state interests, are subject to a balancing test outlined in *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970). Under the *Pike* standard, an "evenhanded" state regulation is valid even if it effects an incidental burden on interstate commerce so long as that burden is not clearly excessive in relation to the local benefits. The examination of "incidental burdens on interstate commerce" is a comparative standard, and focuses on the degree to which a state action burdens interstate commerce relative to intrastate commerce. *Clover Leaf Creamery*, 449 U.S. at 471-72; *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 448 (1960). Where the burden on out-of-state interests is no different from that placed on similar in-state interests, there is no burden on *interstate* commerce; rather, there is only a constitutionally unobjectionable burden on all commerce. Thus, evenhanded legislation will normally be upheld.[12]

---

12 Only in rare instances, such as in *Pike* itself, where there are *both* substantial costs imposed on out-of-state interests and *de minimus* local benefits, will evenhanded regulations be struck down.

C. The Strict Scrutiny Test Is Inapplicable

In contrast to their position below where they urged the trial Court to apply the *Pike* balancing test, petitioners now strenuously argue that the strict scrutiny standard should apply. Pet. App. 19a. The strict scrutiny test has no application here. To begin with, the Ordinance is facially neutral. The Ordinance applies to "all solid waste within or generated within the Town." To that end, "*[a]ll* solid waste . . . shall be removed, transported and/or disposed of only by carters licensed [by the Town]" and *any* and *all* solid waste, regardless of origin, is to be transported and delivered to the Town's transfer station. Pet. App. 50a-53a (emphasis added). Moreover, the Town has established a single, uniform tipping fee for each ton of solid waste brought to the transfer station, regardless of its origin. Thus, the Ordinance "visits its effects on both interstate and local business." *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 87 (1987).

Even if the Ordinance is perceived as burdening the interstate flow of solid waste, it is clear that the Ordinance similarly burdens Clarkstown garbage. The Ordinance's equal treatment of interstate and local solid waste defeats application of the strict scrutiny standard. In each decision applying that standard the Court has been confronted by a statute that imposed an export or import ban of a certain good, while permitting the continuation of in-state trade in that good. *Philadelphia v. New Jersey*, 437 U.S. 617 (law precluded out-of-state trash from being disposed of in New Jersey, but did not similarly restrict disposal of New Jersey trash); *Fort Gratiot*, — U.S. —, 112 S.Ct. 2019 (same effect); *Chemical Waste Mgmt. Inc. v. Hunt*, — U.S. —, 112 S.Ct. 2009 (1992) (law established higher tipping fee for out-of-state-solid waste but did not so burden in-state waste); *Baldwin*, 294 U.S. 511 (statute barred retail sale of Vermont- produced milk in New York); *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (law precluded export of Oklahoma minnows for sale, but allowed in-state sales). It is discrimination against the *inter*state movement of goods, while favor-

ing or failing to burden the *intra*state movement of goods, that triggers the strict scrutiny standard. This point was made most clearly in *Philadelphia v. New Jersey* where the Court stated that while New Jersey could not stem the depletion of landfill capacity by blocking the disposal of only out-of-state trash, it could pursue that goal without violating the Commerce Clause by slowing the flow of all waste, both in-state and out-of-state, into its landfills, even though such a strategy would impede the flow of out-of-state waste across its border. 437 U.S. at 626.

Unlike the situations in *Washington Apple*, 432 U.S. at 352, or *Bacchus*, 468 U.S. at 269-71, there is no evidence of discriminatory purpose behind the Ordinance. Here, the Town Board arranged for the facility's construction and adopted the Ordinance only after DEC determined that the landfill constituted a danger and ordered it closed. The purpose of the Ordinance was to ensure the delivery of all solid waste to the transfer station so as "to benefit the health, welfare, and safety of the town residents." Pet. App. 50a. These articulated purposes deserve deference, *see Clover Leaf Creamery*, 449 U.S. at 463 n. 7, 471 n. 15, and include promoting New York State's public policy of reducing solid waste volume, increasing resource recovery and recycling, and ensuring safe and reliable handling of solid waste. Even if the Ordinance primarily burdened interstate companies, which it does not, that fact "does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce." *Exxon*, 437 U.S. at 125. Discrimination simply is not present.[13] Far from protecting the Town residents' economic interests, the Ordinance works to the residents' economic disadvantage since the same $81 tipping fee that applies to out-of-state haulers also applies to all in-state haulers that come to the facility. Given this equal treatment, it cannot be said that Clark-

[13] The Clarkstown facility ships non-recyclable solid waste to many of the same sites to which petitioners shipped waste. Accordingly, petitioners' suggestion, Pet. Br. at 34-5, that the Clarkstown facility "obstruct[s] the use of solid waste as a source of energy" is disingenuous.

stown is imposing the "full burden" of supporting the transfer facility upon out-of-state interests. *Philadelphia v. New Jersey*, 437 U.S. at 628. Restrictions on out-of-state interests are permissible so long as they are evenly applied to in-state interests. "Obviously, a State that imposes severe withdrawal and use restrictions on its own citizens is not discriminating against interstate commerce when it seeks to prevent the uncontrolled transfer of water out of the state." *Sporhase v. Nebraska*, 458 U.S. 941, 955-56 (1982). Here, "[t]he existence of major in-state interests adversely affected by the [law] is a powerful safeguard against legislative abuse" and justifies the application of the balancing test. *Clover Leaf Creamery*, 449 U.S. at 473 n. 17; *South Carolina State Highway Dept. v. Barnwell Bros. Inc.*, 303 U.S. 177, 187 (1938); *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 675 (1981); *Fort Gratiot*, 112 S.Ct. at 2029 (Rehnquist, C.J., and Blackmun, J., dissenting).

D. Under the *Pike* Balancing Standard, the Ordinance Is Valid

This Court has applied a balancing test to several evenhanded regulations, like the Clarkstown Ordinance, that do not differentiate between in-state and out-of-state interests. In *Clover Leaf Creamery*, the Court applied the balancing test and upheld a statute that prohibited all retailers from selling milk in plastic, non-returnable cartons. Although the statute did burden out-of-state plastic manufacturers, "this burden [was] not 'clearly excessive' in light of the substantial state interests in promoting conservation of energy and other natural resources and easing solid waste problems." 449 U.S. at 473; *see Huron Portland Cement*, 362 U.S. at 448 (burden did not outweigh benefits of evenhanded smoke abatement ordinance).

In a Commerce Clause challenge against a similar flow control law, the Third Circuit Court of Appeals applied the *Pike* test and upheld the statute. *Filiberto Sanitation, Inc. v. New Jersey Dept. of Environmental Protection*, 857 F.2d 913, 919-

22 & n.1 (3d Cir. 1988). The regulation in *Filiberto Sanitation* provided several benefits including ensuring the proper disposal of all trash, reducing truck traffic, providing accurate data for planning purposes, facilitating long- and short-term contracts for final disposal, and discouraging illegal dumping by directing garbage to prescribed sites. The county transfer station charged $100 per ton. Filiberto claimed it charged $50 per ton. *Id.* at 916.

Recognizing that legitimate health and safety regulations may unavoidably effect an incidental burden on interstate commerce, *id.* at 918-19 (citing cases), the Third Circuit focused on whether the regulation saddled out-of-state interests with the burden of the solution to New Jersey's solid waste problem. The court held that the regulation did not constitute economic protectionism because: it applied equally to in-state and out-of-state interests, *id.* at 921; no discriminatory purpose was identified, *id.* at 920-21; and the garbage continued to flow into interstate commerce. Accordingly, the court declined to apply the heightened scrutiny standard and instead applied the balancing test. Finding no burden that discriminated against interstate commerce and the existence of compelling local benefits, the Third Circuit rejected the Commerce Clause challenge. *Id.* at 922.

The Sixth Circuit Court of Appeals has also upheld an ordinance directing that all trash be delivered to a waste-to-energy plant. *Hybud Equipment Corp. v. Akron*, 654 F.2d 1187 (6th Cir. 1981). The Sixth Circuit balanced the parties' claims. Since the ordinance was a legitimate exercise of the police power and its burden "f[e]ll hardest" on Akron residents and interests, it did not constitute a discriminatory burden on out-of-state interests and did not violate the Commerce Clause. 654 F.2d at 1194-95; *see also In re Waste Disposal Agreement*, 237 N.J. Super. 516, 568 A.2d 547 (N.J. Super. 1990); *In re Fiorillo Bros.*, 242 N.J. Super. 667, 577 A.2d 1316 (N.J. Super. 1990); *Harvey & Harvey, Inc. v. Delaware Solid Waste Auth.*, 600 F. Supp. 1369, 1379-1381 (D. Del. 1985).

Like fire and police protection, the control of local sanitation—including garbage collection and disposal—remains a paradigmatic example of the exercise of municipal responsibility and power. *California Reduction Corp.*, 199 U.S. 306; *Gardner v. Michigan*, 199 U.S. 325. As the Second Department correctly noted below, "[l]ocal governments have long been authorized to enact laws relating to the 'safety, health, and well-being of persons or property' (N.Y. Const., Art. IX, § 2 [c][10]), and it is well settled that the regulation of solid waste collection and disposal, a function traditionally entrusted to State and local governments, is fundamentally related to the public health and welfare." Pet. App. 9a (citations omitted).

Police power ordinances, such as Clarkstown's, have a strong presumption of validity. As this Court stated in *California Reduction*, "[e]very intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety." 199 U.S. at 319. This is so because states retain the authority to regulate matters of state and local concern on which Congress has not spoken. *See Parker v. Brown*, 317 U.S. at 360-363. Given the hazards associated with garbage and its negative economic value, *see Swin Resource Systems, Inc. v. Lycoming County*, 883 F.2d 245, 253 (3rd Cir. 1989), *cert. denied*, 493 U.S. 1077 (1990), and their traditional responsibility for garbage disposal, states and localities have, and must continue to have, the power to direct garbage to facilities that can safely dispose of it. As the Appellate Division recognized below, the focus of such police power regulation is "public welfare, rather than profit." Pet. App. 10a. "Where Congress has not acted, a state's own health and safety-oriented trash disposal regulation violates no federal constitutional precepts, provided it neither unduly protects its own citizens nor discriminates against another state's citizens." *In re Waste Agreement*, 568 A.2d at 555; *Parker v. Brown*, 317 U.S. at 367. Moreover, where such regulations are consistent with overall Congressional legislation, as in the present case, they should receive greater deference.

As set forth *supra* at 10-15, flow control ordinances promote many compelling governmental purposes. Clarkstown's Ordinance similarly fosters important interests. The Ordinance ensures that all recyclables are removed from the waste stream and thereby promotes the conservation of energy and other natural resources. Petitioners' attempted disposal of recyclable materials at a landfill, J.A. 16-17, underscores the need for flow control. Moreover, by increasing recycling and imposing volume-based disposal costs, the Ordinance promotes the reduction of the overall volume of solid waste to the fullest extent possible. These two goals constitute "substantial state interest[s]." *Clover Leaf Creamery*, 449 U.S. at 473; RCRA § 4001, 42 U.S.C. § 6941; ECL § 27-0106(1). Additionally, the Ordinance allows Town and DEC officials to inspect deliveries to ensure individuals or corporations are not avoiding DEC's medical or hazardous waste regulations. The benefits of flow control and comprehensive inspections were recently demonstrated when the monitors detected radioactive waste and thereby prevented the contamination of the waste stream. D. McClendon, *Radioactive Waste is Held in Limbo*, Rockland Journal-News, May 17, 1993, at B1. Furthermore, the Ordinance contributes to the financial viability of the facility. By designating a single delivery site for solid waste, the Town also ensures that garbage is handled by an environmentally-sound facility and augments ordinances that prohibit "midnight dumping" in remote areas. The Town has cause to be concerned about this issue. *See* S. Lieberman, *Abandoned Trash in West Virginia is Traced to Local Carbone Site*, Rockland Journal-News, July 26, 1991, at B3. Lastly, the Ordinance ensures that town officials will have a complete, accurate, and ongoing understanding of the waste stream, allowing effective planning.

Even assuming, however, that the Ordinance effects some burden on interstate commerce, it is only incidental and should not defeat the evenhanded Ordinance which promotes compelling state and local interests. *Clover Leaf Creamery*, 449 U.S. at 471-73; *Huron Portland Cement*, 362 U.S. at 448

(evenhanded city smoke abatement ordinance upheld, despite requirement that ships passing in interstate waters would have to modify their boilers, given important city interest "to better the health and welfare of the community"); *Parker v. Brown*, 317 U.S. at 367 (price stabilization program upheld "although it undoubtedly affected the commerce by increasing the interstate price of raisins and curtailing interstate shipments"). Thus, where, as here, the challenged regulation imposes no burden on out-of-state interests and promotes compelling local interests the Court should uphold the Ordinance.

E. Given the Compelling Non-Economic Interests Fostered by the Ordinance and the Absence of Other Alternatives, the Town Ordinance Is Constitutional Under Either Standard of Review

Under either the strict scrutiny standard or the balancing test, the statute should be found constitutional because less-discriminatory alternatives are not available to preserve the compelling, non-economic local interests. *Maine v. Taylor*, 477 U.S. at 137-38; *see Fort Gratiot*, 112 S.Ct. at 2027-28. Petitioners have suggested the creation of a solid waste tax district or raising the property tax as a "non-discriminatory" alternative to flow control. Pet. Br. at 27-29, 36. This argument incorrectly assumes that the sole purpose of flow control is to finance solid waste management facilities. As discussed, *supra* at 10-15, flow control serves many compelling local purposes in addition to facility financing.

Lack of control over garbage will doom any attempt at long range solid waste planning and could well leave solid waste facilities underutilized or standing idle. More importantly, taxes do not direct garbage to authorized, environmentally-sound facilities. Additionally, taxes, unlike tipping fees, will not bring about a reduction of solid waste nor will they promote recycling because a general tax is too far removed from the production of garbage to be an effective tool in encouraging waste reduction. Just as water meters discourage water

waste and allow users to be billed according to the quantity they consume, tipping fees will encourage waste reduction and will impose, quite properly, the greatest costs on those who produce the most waste. Since taxes do not affect disposal habits, they cannot effectuate the federal and state goals to increase recycling and resource recovery and reduce waste. Unlike channeling solid waste to a central point where it is inspected and materials are removed, taxes do not allow municipalities to ensure that recyclable goods are removed from the waste stream. Also, the erection of a tax regime in place of flow control would allow haulers to avoid the radiation detection check and inspection by town personnel. Haulers then could mix hazardous and medical waste with solid waste. Similarly, a tax regime provides no effective means to minimize CERCLA liability or to analyze the waste stream to support long-term planning. Lastly, with no requirement that trash be reduced and compacted for efficient shipments in long-bed trucks, the number of truck trips would increase and savings in gasoline economy would be lost.

The so-called "processing" cases cited by petitioners are inapplicable. Pet. Br. at 19-22. None of these decisions involved a regulation to protect the community's health and environment. The state policies at issue in those cases do not rise to the level of a state's *responsibility* to protect the health and environment of its citizens. *See Toomer v. Witsell*, 334 U.S. 385 (1948) (regulation designed to increase employment in state shrimp industry); *South Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 85-6, n. 5 (1984) (regulation designed to protect in-state employees resulted in the production of "cants," a semi-processed timber product of dubious utility); *Pike v. Bruce Church*, 397 U.S. at 144-45 (regulation designed to effectuate the state's "tenuous interest" in promoting the reputation of Arizona cantaloupes); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928) (statute's real design was to cause "the removal of the packing and canning industries from Mississippi to Louisiana"). Garbage is fundamentally different from the goods involved in those cases. Unlike shrimp, oysters,

and timber, garbage has a negative economic value and endangers the health and environment. While petitioners characterize garbage as gold, its "value" is created only because it must be disposed of in an environmentally-sound manner.[14] None of the cases cited by petitioners address the power of states and localities to channel wastes for the protection of the community.

In an attempt to avoid the balancing standard, petitioners appear to argue that *Pike* "actually applied the *per se* standard in striking down the statute." Pet. Br. 30 n. 16. Petitioners misunderstand *Pike*. There, the cantaloupe packing requirement exacted a heavy burden. It would cause the respondent to lose its entire 1968 crop valued at $700,000, and to expend some $200,000 to build an in-state packing facility, after already having spent $3,000,000 to develop uncultivated, arid land into a farm. In comparison, the local interest was virtually non-existent. The statute was enacted to promote the reputation of Arizona cantaloupes and would allow other growers to benefit from respondent's superior product. The Court explicitly considered both the benefits and the burden of the state law, and found the burden too great:

> Such an incidental consequence of a regulatory scheme [i.e., the costs to appellee] could perhaps be tolerated if a more compelling state interest were involved. But here the State's interest is minimal at best. . . .

397 U.S. at 146. This weighing of the benefits and burdens of the state law was a deliberate and obvious application of the balancing test expounded in *Pike* itself, and the Court invalidated the law not under any *per se* rule, but rather because the

---

[14] In addition, the regulation in *Toomer* "captured" shrimp caught in the ocean and forced the harvest to come ashore in South Carolina before it could continue in interstate commerce. Clarkstown has no such capture provision; haulers are free to bring non-Clarkstown waste wherever they wish. All the Ordinance requires is that once haulers decide to bring garbage into the town, it be delivered to the environmentally-sound transfer facility.

state's interest was so "tenuous," *id.* at 145, and the statute imposed burdens.[15]

Neither is *Waste Systems Corp. v. County of Martin*, 985 F.2d 1381 (8th Cir. 1993), persuasive authority. At the outset, the court overlooked the holding in *Maine v. Taylor*, 477 U.S. at 137-38, that a direct restriction of trade does not, by itself, render a law unconstitutional. 985 F.2d at 1385. The court also failed to give sufficient weight to the counties' valid health and safety interests in the ordinances at issue. The ordinances, rather than being mere "economic" measures, ensured the responsible and environmentally-sound disposal of local waste in accordance with the federal government's own priorities for disposal methods, *see* EPA *Agenda for Action* at 18-19, and permitted the development of local waste disposal capacity so that the counties could fulfill their traditional responsibilities for solid waste management. Additionally, the court apparently misunderstood both the significant difference between composting and landfilling and the burdens incurred by the county residents. 985 F.2d at 1387-88. Moreover, the officials involved in the litigation did not clearly set forth many benefits achieved by flow control. *Id.* at 1388-89. The Eighth Circuit ignored the genuine problems that local governments face in trying to meet their obligations for waste disposal and mistakenly labeled as "economic protectionism" the counties' attempts to address a very real problem having little to do with profit-making or economic competition.

In analyzing previous cases, this Court has stated that "[w]hat is crucial is [whether the regulation is an] attempt by one State to isolate itself from a problem common to many by

[15] Even if this court were to strike down section 5 as violative of the Commerce Clause, the requirement of section 3 that all garbage originating within the Town be delivered to the transfer facility should be upheld. *Parker v. Brown*, 317 U.S. 341. Courts have upheld town or county flow control regulations. *Filiberto Sanitation*, 857 F.2d 913; *A.A. Mastrangelo, Inc. v. Department of Environmental Protection*, 90 N.J. 666, 449 A.2d 516 (N.J. 1982); *Browning Ferris Industries of Tennessee, Inc. v. Nashville*, 1991 WL 219383 (Tenn. Ct. App. Oct. 30, 1991).

erecting a barrier against the movement of interstate trade." *Philadelphia v. New Jersey*, 437 U.S. at 628; *Baldwin*, 294 U.S. at 527. This case does not implicate such concerns. Clarkstown is not "turning its back" on this problem by attempting to keep an undesirable good out of the town or limit access to disposal sites, *see e.g. Philadelphia v. New Jersey*, nor is it trying to "hoard" a natural resource within the town, *see e.g. Kansas Natural Gas*, 221 U.S. 229; *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923). Clarkstown is merely directing *the waste product* of modern society to a centralized location so that the volume of solid waste is reduced, energy is conserved, and the environment less burdened.

CONCLUSION

Petitioners' claim is essentially that their New York based operation is less profitable as a result of Clarkstown's transfer station and ordinance. However, "[t]he Commerce Clause . . . does not elevate free trade above all other values," *Maine v. Taylor*, 477 U.S. at 151, nor have courts "ascribe[d] to the thesis that [a hauler] is constitutionally entitled to the least expensive interim solution to this pervasive waste disposal problem under the guise of Commerce Clause protection." *In re Waste Agreement*, 568 A.2d at 555. In light of garbage's potential hazards and negative value and in contrast to various states' attempts to ban the *importation* of garbage, flow control regulations will not foster parochial "jealousies and aggressions" among the states of the type that motivated the grant of the commerce power to Congress.[16]

Petitioners' claim would jeopardize recycling and resource recovery programs across the country as well as programs to reduce and safely dispose of solid and hazardous waste and

[16] Ferrand, Records of the Federal Convention, Vol. II, p. 308; Vol. III, pp. 478, 547, 548; *see* S. 2877, 102d Cong., 2d Sess. (1992) (legislation introduced by Senators Coats and Baucus to curtail importation of garbage).

would also shackle state and local governments in their efforts to protect the health and environment of their communities.

For all the foregoing reasons, the judgment of the New York Supreme Court, Appellate Division, Second Department, should be affirmed.

Dated: New York, New York
August 19, 1992

Respectfully submitted

Attorneys for Amici Curiae

ROBERT ABRAMS,
Attorney General of the State of New York
JERRY BOONE,
Solicitor General
ANDREA GREEN,
Deputy Solicitor General
JOHN J. SIPOS,*
GORDON J. JOHNSON,
Assistant Attorneys General
PAUL LLEWELLYN, *Legal Intern*
120 Broadway
New York, New York 10271
(212) 416-8473

Attorneys for the State of New York

* *Counsel of Record*

O. PETER SHERWOOD,
Corporation Counsel of the City of New York
LEONARD J. KOERNER,
Chief Assistant Corporation Counsel
ELIZABETH ST. CLAIR,
HILARY BREST,
MARJORIE FOX,
ROBERT ORLIN,
Assistant Corporation Counsel
100 Church Street
New York, New York 10007

Attorneys for the City of New York

JONATHAN WOOD,
Assistant County Attorney
Tompkins County Attorney Office
125 East Court Street
Ithaca, New York 14850
MARTIN GOLD
LOUIS A. EVANS
Brown & Wood
One World Trade Center
New York, New York 10048

Attorneys for the New York State Association of County Attorneys

FILED
AUG 23 1993
OFFICE OF THE CLERK

No. 92-1402

In The
Supreme Court of the United States
October Term, 1993

**C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,**

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ Of Certiorari to the Supreme Court,
Appellate Division, Second Department
of the State of New York

BRIEF OF CLARENDON FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Jonathan L. Kvanvig
Texas A&M University
College Station, TX 77843
(409) 845-2247

Ronald D. Maines
(Counsel of Record)
Maines & Harshman, Chrtd.
2300 M Street, N.W.
Washington, DC 20037
(202) 223-2817

Attorneys for Amicus Curiae
CLARENDONFOUNDATION

August 23, 1993

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. LOCAL LAW 9 DOES NOT HAVE A PROTECTIONIST PURPOSE	4
II. LOCAL LAW 9 IS NOT PROTECTIONIST IN EFFECT	6
CONCLUSION	12

TABLE OF AUTHORITIES

Cases: **Page**

City of Philadelphia v. New Jersey,
437 U.S. 617 (1978) 2

Hybud Equipment Corp. v. City of Arizona,
654 F.2d 1187 (6th Cir. 1981) 8

Kassell v. Consolidated Freightway Corp.,
450 U.S. 662 (1981) 3

New Energy Co. v. Limbach,
486 U.S. 269 (1988) 2

Maine v. Taylor,
447 U.S. 131 (1986) 10

Southern Pacific Co. v. Arizona,
325 U.S. 761 (1945) 8

Statutes:

42 U.S.C. §6901(a)(4)(1988) 3

In The
Supreme Court of the United States
October Term, 1993

No. 92-1402

**C & A CARBONE, INC,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,**

Petitioners,

v.

TOWN OF CLARKSTOWN,

Respondent.

On Writ of Certiorari to the Supreme Court,
Appellate Division, Second Department
of the State of New York

BRIEF OF CLARENDON FOUNDATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Pursuant to Rule 36.2 of this Court, Clarendon Foundation respectfully submits this brief *amicus curiae* in support of Respondent Town of Clarkstown. Written consent to the filing of this brief has been granted by counsel for

all parties. Copies of the letters of consent have been lodged with the Clerk of the Court.

Clarendon Foundation is a non-profit, non-partisan legal and educational foundation concerned with contemporary issues related to the Constitution, democratic government and the attendant rights and responsibilities of citizenship. The foundation participates in various forums in cases where the resolution of constitutional issues may be aided by philosophical analysis in addition to case law and public policy considerations. Because this case raises questions of paramount significance to the public interest, we believe that our perspective will complement the brief of Respondent and assist the Court in the resolution of these issues.

SUMMARY OF ARGUMENT

In *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court reiterated that the central inquiry in dormant Commerce Clause analysis is whether the local law under scrutiny is "basically a protectionist measure" or, instead, fairly can be viewed as addressing legitimate local concerns. *Id.* at 624. A law is a protectionist measure when it is discriminatory against out-of-state interests -- when it has the purpose or effect of isolating a state from the national economy with the result that out-of-state interests are burdened while in-state interests are correspondingly benefited. *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). Discrimination against the free flow of commerce exists when a purpose is identified for treating in-state and out-of-state interests differently *on the basis of their origin*. *City of Philadelphia* at 627.

At the same time, municipal governments have long been authorized to enact laws relating to the health and safety of their residents, even when such measures may have an effect upon interstate commerce. *See, Kassell v.*

Consolidated Freightway Corp., 450 U.S. 662, 670 (1981)(the power of a state or municipality to implicate commerce "is never greater than in matters of traditionally local concern"). The regulation of solid waste collection and disposal is a function historically entrusted to local governments. Indeed, Congress has expressly provided that "the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies. . . ." 42 U.S.C. §6901(a)(4)(1988).

Clarkstown's Local Law 9 is a lawful resolution of the tension which is invariably present in disputes involving a municipality's jurisdiction over uniquely local matters. The "Balkanization" and "economic protectionism" decried by Petitioners are concerns which, quite simply, have no bearing on the facts of this case. Local Law 9 does not have a discriminatory purpose, facial or otherwise. Petitioners' argument that the law amounts to a "direct restriction on exports" misapprehends the legitimate factors at play in a municipality's decision how best to effect a plan for the collection and disposal of solid waste.

Nor does Local Law 9 have a protectionist effect. It is a regulatory measure which, by definition, must involve a degree of oversight. But Petitioners' argument from efficiency, taken to its logical conclusion, would render invalid virtually any local law that provided for waste collection and disposal in other than a purely commercial manner. To the contrary, local governmental control over waste collection and disposal issues is a proper exercise of the police power and Local Law 9 is a wholly legitimate manifestation of such power.

ARGUMENT

I. LOCAL LAW 9 DOES NOT HAVE A PROTECTIONIST PURPOSE.

Petitioners devote considerable energy to the proposition that Local Law 9 is facially or overtly discriminatory. By definition, in order to be discriminatory, a law must contain a classification. To demonstrate that the overt purpose of Local Law 9 is to discriminate against non-local users would require a showing that the law itself first differentiated among users generally, and then employed that classification to burden one group more than another.

A simple review of Local Law 9, however, reveals that it does not treat in-state and out-of-state interests disparately. Indeed, the law only applies to garbage discarded within the city of Clarkstown, with no reference at all to the origin of the garbage. Because the law draws no distinction between in-state and out-of-state garbage disposers, it is clear that no discriminatory purpose exists on its face.

A simple counterfactual makes the point even plainer. Certainly one can posit a local law which penalized non-local disposers -- for example, by charging a non-local disposal fee in addition to the tipping fee already required, or by requiring of non-locals a special permit to discard trash at the Clarkstown transfer station. In such a case, Petitioners may well be justified in claiming that the local law was overtly discriminatory. Local Law 9, however, involves no classification of any sort. Because discrimination against non-locals would require differentiation among customers generally -- but no such differentiation obtains here -- the law is not facially discriminatory.

In arguing to the contrary, Petitioners assert: "On its face, . . . Local Law 9 forbids individuals or companies located in Clarkstown from disposing of non-recyclable waste

by sending it directly to out-of-town or out-of-state facilities. . . ." This, Petitioners urge, constitutes a "direct restriction on exports," a facial purpose of the law pursued "at the direct expense of out-of-town residents who would otherwise send their trash to Petitioners' facility." Petitioners' Brief at 11.

This argument, however, does not show that Local Law 9 has a discriminatory purpose, as Petitioners claim. A legislative act, like any act, may have a particular consequence without such consequence's being a direct intent of the legislature. This is so even where the legislature may have envisioned that the consequence in question might materialize. Although the effects of legislation are relevant to its constitutionality (*see* Section II, *infra*), one cannot mechanically infer from the effects of legislation the purpose of its authors. Petitioners erringly conflate the purpose of Local Law 9 with a possible consequence that may flow from its implementation. In short, facial discrimination in the law must be found in the language of the law itself. Because no classification on the basis of origin is found in Local Law 9, it is not discriminatory on its face.

A similar fallacy is in play in Petitioners' claim that there is a discriminatory intent underlying Local Law 9. Noting the arrangement between the town and the contractor who would construct and operate the transfer station, Petitioners assert that any "purported safety and health benefits of Local Law 9 derive from the continued economic viability of the town's waste facility -- that is, from the town's desire not to pay under its guarantee to its contract." Petitioners' Brief at 26. In other words, Petitioners infer from the arrangement between the town and the contractor that the fundamental purpose of Local Law 9 is economic rather than consideration for health and safety. On that basis, Petitioners claim that Local Law 9 is a breach of the

Commerce Clause, apparently on the theory that an economic motivation somehow would reveal a discriminatory purpose.

Discriminatory intent for Local Law 9, however, is not implied by these facts. As the New York appellate court said in reference to Clarkstown's local plan to address waste collection and disposal: "A concern for the continuing economic viability of a solid waste management facility established pursuant to such a plan does not negate or detract from, but in fact is a part of the health, safety, and environmental concerns such plan is designed to address." Petitioners' App. at 10a. The essential point is that the constitutional validity of Clarkstown's law should not be doubted merely because Clarkstown determined to handle its solid waste problem in an economically beneficial manner. As this Court recognized in *City of Philadelphia* regarding the purpose of the New Jersey law there in question: "[W]e assume New Jersey has every right to protect its residents' pocketbooks as well as their environment." *Id.* at 626.

Accordingly, there are no grounds to find Local Law 9 unconstitutional because its purpose is protectionist. No such purpose, facial or otherwise, can be discerned from the circumstances of this case.

II. LOCAL LAW 9 IS NOT PROTECTIONIST IN EFFECT.

Petitioners next argue that Local Law 9 is a protectionist measure because it assertedly has a discriminatory effect against out-of-state interests. The thrust of Petitioners' argument on this score is that Local Law 9 is a "prohibition" on the export of trash. Thus, Petitioners assert:

> The effect of Local Law 9 is to prohibit flatly the export of trash to points outside of Clarkstown unless the trash is first brought to the designated facility for processing. This type of restriction -- "requiring business operations to be performed in the home [locality] that could more efficiently be performed elsewhere" -- is "virtually *per se* illegal," even if the locality is "pursuing a clearly legitimate local interest."

Petitioners' Brief at 18. Admittedly, Local Law 9 does involve a certain kind of restriction, but it is hardly an "export restriction" in any rational sense of that concept. Rather, the law involves a regulatory limitation on the way in which commercial activity related to the collection and disposal of trash is carried out. Thus, what Local Law 9 prohibits is the *wholly private removal* of garbage from Clarkstown. Petitioners conclude that such a limitation is "virtually *per se* illegal" because it purportedly requires a business operation to be performed at Clarkstown's facility which Carbone could perform more efficiently.

Even if it were true that Clarkstown's facility and Carbone's facility were commensurable and that Carbone's facility could be operated more efficiently, Petitioners' argument proves too much, for the same conclusion would follow if Clarkstown had adopted other non-controversial and plainly constitutional plans for handling solid waste disposal.

Suppose, for instance, that Clarkstown permitted multiple facilities so long as they were licensed pursuant to some local regulatory scheme. Even under this approach, it would remain true that the wholly private removal of garbage would be prohibited and, hence, to use Petitioners' language, that this business operation could be more

efficiently performed elsewhere (*i.e.*, in a purely private manner, under no regulatory scheme whatsoever). If Petitioners' reasoning were sound, however, it would follow that any number of non-controversial restrictions on the handling of garbage would fall to Commerce Clause attack, eviscerating the fundamental maxim that the Commerce Clause "does not elevate free trade above all other values," *Maine v. Taylor*, 447 U.S. 131, 151 (1986).

Indeed, through the years various federal and state courts consistently have sustained local governmental control of the collection and disposal process, even to the exclusion of private collectors, as a proper exercise of the police power. *See, e.g., Hybud Equipment Corp. v. City of Akron*, 654 F.2d 1187, 1192 (6th Cir. 1981). This is so because there "a residuum of power in the State to make laws governing matters of local concern." *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945). Accordingly, because Petitioners' argument collapses when taken to its logical conclusion, it must be rejected.

Several other features of Petitioners' argument for a protectionist effect are equally invalid. For example, Petitioners argue that the cost-differential between the tipping fees at the Clarkstown transfer station and the Carbone plant is evidence of a discriminatory impact on out-of-state interests. Petitioners' argument appears to be that the $11 difference between the two fees must be borne by out-of-state interests and thus manifests a burden on interstate commerce. For at least two reasons, this argument fails.

First, Carbone's out-of-state customers have dealt heretofore with Carbone rather than with Clarkstown. If Local Law 9 is upheld, Carbone will have to pay the Clarkstown facility a certain amount to effect the disposal of the non-recyclable portion of the trash. But there is no evidence before the Court as to what that cost might be.

The one thing we know for certain is that it is *irrelevant* to the $11 differential in tipping fees and that fact is therefore not probative of the issue of discriminatory effect. That particular data would be probative only if the out-of-state firms would have to ship their trash to the Clarkstown facility instead of to Carbone if Local Law 9 were upheld.

Second, in any case, the Clarkstown transfer station is not a direct competitor of Carbone because their respective operations are different in nature. Clarkstown's transfer station consolidates local garbage into large loads and arranges for its shipment to final disposal sites. Carbone receives refuse for the purpose of gleaning from it recyclable material, as well as arranging for shipment of the residue to final disposal sites. For this reason, Petitioners' tying the asserted discriminatory effect to a difference in efficiency between the two operations is an error. The two facilities are incommensurable. Thus, the cost difference does not show that Carbone is more efficient at disposing of garbage than is the Clarkstown facility.

Moreover, even assuming for the sake of argument that a burden on interstate commerce of the sort Petitioners seek could be identified, it would be cognizable only if local economic interests were benefited as a result. *New Energy Co. v. Limbach*, 486 U.S. at 273 (A law is protectionist when it "benefits in-state economic interests by burdening out-of-state interests"). This would require evidence that Carbone's shipping the garbage component of its sorted refuse on its own, rather than sending it to the Clarkstown transfer station, resulted in some benefit to the town.

The only evidence Petitioners offer in this connection is the suggestion that "operations such as Petitioners', which bypass the designated facility, increase the likelihood that the guarantee [under the town's arrangement with the operator of the transfer station] might not be met." Petitioners' Brief at 26.

Upon reflection, however, it is clear that this information is not probative. First, a theoretical increase in the probability that the local community may benefit from the law does not show that the local community *actually* benefits from the law. Second, and more fundamental, even if it were true that Carbone's presence makes it more likely that the town might not meet its tonnage guarantee, we have no way of knowing on these facts how to quantify that probability. It is no doubt possible that substantial statistical movement in the direction of the town's not meeting its guarantee will have no impact at all on that prospect as a practical matter.

In short, the conclusion that residents of Carbone "benefit" from a purported burden on interstate commerce simply does not follow from Petitioners' argument. Indeed, it is more accurate to conclude that Clarkstown's residents themselves, rather than out-of-state entities, are the ones burdened by Local Law 9. For it is upon the local residents that the higher costs of the town's waste disposal plan fall.

At a more fundamental level, it is a mistake for Petitioners to analyze the effects of Local Law 9 on the assumption that garbage is a commodity subject to export. A commodity is something of value that is bought or sold, and only commodities are exported or imported. In the context of this case, garbage is neither a commodity nor an item of export. It is a valueless material significant only because it requires disposal *via* a disposal plan consistent with the health and safety of local residents. To suggest that the execution of that plan involves Clarkstown in commercial competition with Carbone -- as Carbone must claim to advance its "protectionist" argument -- is an addled notion. Recognizing at the threshold that garbage in this context should not be viewed as a commodity should pre-empt the controversy over relative "burdens" and "benefits" -- for those categories of analysis do not legitimately apply here.

In sum, it is incorrect that Local Law 9 is protectionist in effect, for there is no evidence that the law actually benefits local interests by burdening non-local interests. In addition, a miscellany of other reasons provide ample grounds for concluding that Carbone's analysis on this score is misconceived.

CONCLUSION

For these reasons, the Court should affirm the decision of the Supreme Court, Appellate Division, of the State of New York.

Respectfully submitted,

Jonathan L. Kvanvig
Texas A&M University
College Station, TX 77843
(409) 845-2247

Ronald D. Maines
(Counsel of Record)
Maines & Harshman, Chrtd.
Suite 900
2300 M Street, N.W.
Washington, DC 20037
(202) 223-2817

Attorneys for Amicus Curiae
Clarendon Foundation

August 23, 1993

Supreme Court, U.S.
FILED
AUG 23 1993
OFFICE OF THE CLERK

No. 92-1402

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT, APPELLATE DIVISION SECOND DEPARTMENT OF THE STATE OF NEW YORK

AMICUS BRIEF IN SUPPORT OF RESPONDENT TOWN OF CLARKSTOWN SUBMITTED BY THE STATE OF OHIO ON BEHALF OF THE STATES OF ALASKA, ARIZONA, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, MAINE, MASSACHUSETTS, MICHIGAN, MINNESOTA, MONTANA, NORTH CAROLINA, OREGON, PENNSYLVANIA, SOUTH CAROLINA, VIRGINIA, WISCONSIN AND THE COMMONWEALTH OF PUERTO RICO.

LEE FISHER
Attorney General of Ohio

By: **SUSAN E. ASHBROOK**
Assistant Attorney General
Environmental Enforcement Section
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-2766

BRYAN F. ZIMA
Assistant Attorney General
Co-Counsel

Counsel of Record for Amici States

BEST AVAILABLE COPY

CHARLES E. COLE
Attorney General of Alaska
State of Alaska
Department of Law
Post Office Box 110300
Juneau, Alaska 99811-0300

GRANT WOODS
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007

RICHARD BLUMENTHAL
Attorney General of Connecticut
55 Elm Street
Hartford Connecticut 06106

CHARLES M. EOBERLY, III
Attorney General of Delaware
820 North French Street
Wilmington, Delaware 19801

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capital
Tallahassee, Florida 32399-1050

ROBERT A. MARKS
Attorney General of Hawaii
Department of Attorney General
425 Queen Street
Honolulu, Hawaii 96813

ROLAND W. BURRIS
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601

PAMELA CARTER
Attorney General of Indiana
402 West Washington Street
Indiana Government Center
South - 5th Floor
Indianapolis, Indiana 46204

BONNIE J. CAMPBELL
Attorney General of Iowa
Hoover State Office Building
Des Moines, Iowa 50319

MICHAEL E. CARPENTER
Attorney General of Maine
Statehouse Station 6
Augusta, Maine 04333

SCOTT HARSHBARGER
Attorney General of the
Commonwealth of Massachusetts
Office of the Attorney General
One Ashburton Place
Boston, Massachusetts 02108

FRANK J. KELLEY
Attorney General of Michigan
Post Office Box 30212
Lansing, Michigan 48909

HUBERT H. HUMPHREY, III
Attorney General of Minnesota
BEVERLY CONNERTON
STEPHEN SHAKMAN
Assistant Attorneys General
520 Lafayette Road, Suite 200
St. Paul, Minnesota 55155-4199

JOSEPH P. MAZUREK
Attorney General of Montana
215 North Sanders
Helena, Montana 59620-1401

MICHAEL F. EASLEY
Attorney General of North Carolina
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

THEODORE R. KULONGOSKI
Attorney General of Oregon
100 Justice Building
Salem, Oregon 97310

ERNEST D. PREATE, JR.
Attorney General of Pennsylvania
15th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

PEDRO R. PIERLUISI
Attorney General of Puerto Rico
Office of the Attorney General
Department of Justice
P.O. Box 192
San Juan, Puerto Rico 00902

T. TRAVIS MEDLOCK
Attorney General of South Carolina
Post Office Box 11549
Columbia, South Carolina 29211

STEPHEN D. ROSENTHAL
Attorney General of Virginia
Office of the Attorney General
101 North Eighth Street
Richmond, Virginia 23219

JAMES E. DOYLE
Attorney General of Wisconsin
114 East State Street
Madison, Wisconsin 53707

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. A LOCAL LAW DIRECTING THE FLOW OF GARBAGE, GENERATED OR COLLECTED LOCALLY, THROUGH A DESIGNATED TRANSFER FACILITY IS WHOLLY WITHIN THE AUTHORITY OF A LOCAL COMMUNITY TO REGULATE THE COLLECTION AND DISPOSAL OF GARBAGE, AND DOES NOT IMPACT INTERSTATE COMMERCE 3

A. The Courts Have Long Respected The Authority Of Local Communities To Impose Regulations Governing The Collection And Disposal Of Local Garbage. 4

B. Flow Control Laws Such As the Clarkstown Ordinance Do Not Impact Interstate Commerce. 6

II. EVEN IF THE CLARKSTOWN ORDINANCE AFFECTS INTERSTATE COMMERCE, THE ORDINANCE, AND OTHER WASTE MANAGEMENT LAWS THAT AUTHORIZE FLOW CONTROL, ARE EVEN-HANDED LAWS THAT ARE AN INTEGRAL PART OF A STATUTORY PROGRAM TO PROTECT THE PUBLIC HEALTH AND WELFARE, AND DO NOT IMPERMISSIBLY BURDEN INTERSTATE COMMERCE. 9

A. The Clarkstown Ordinance And Other So-Called "Flow Control" Laws Serve Important Governmental Interests And Are Integral Parts Of Comprehensive Police Power Enactments For The Local Management Of Solid Waste. 12

1. Flow Control Enables Local Governments To Engage In Effective Long-Term Planning. 15

2. Flow Control Allows A Community The Ability To Meet Its Goal Of Reducing Reliance On Landfills. 17

3. Flow Control Is Necessary To Finance Alternative Facilities. 18

B. Flow Control Statutes Are Lawful Even-Handed Regulations And Are Not Economic Protectionist Measures. 21

C. The Clarkstown Ordinance And Flow Control Laws In General Do Not Impose A Burden On Interstate Commerce That Is Clearly Excessive In Relation To The Benefits Of Those Laws. 26

III. EVEN IF THIS COURT FINDS THAT FLOW CONTROL STATUTES ARE DISCRIMINATORY, THEY SHOULD STILL BE UPHELD BECAUSE THERE ARE NO NON-DISCRIMINATORY ALTERNATIVES WHICH ALLOW GOVERNMENT TO ACHIEVE ITS IMPORTANT SOLID WASTE MANAGEMENT GOALS. 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES **PAGE**

California Reduction Company v. Sanitary Reduction Works of San Francisco, 199 U.S. 306 (1905) ... 4, 5, 16

Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency, 715 F.2d 419 (8th Cir., 1983) *cert. denied* 471 U.S. 1003 (1985) 5

Chemical Waste Management v. Hunt, 112 S.Ct. 2009 (1992) 2, 6, 22

City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) 1, 2, 6, 7, 10, 22, 23, 27

Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975) 27

Complete Auto Transit v. Brady, 430 U.S. 274 (1977) 27

Dept. of Revenue of the State of Washington v. Ass'n of Washington Stevedoring Cos., 435 U.S. 734 (1978) 27

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S.Ct. 2019 (1992) 2, 6, 22, 23

Foster-Fountain Packing Co., Inc. v. Haydel, 278 U.S. 1 (1928) 8, 24

Gardner v. Michigan, 199 U.S. 325 (1905) 5

Gurtz v. San Bruno, 8 Cal. App. 2d 399, 48 P.2d 142 (1935) 6

H.P. Hood & Sons v. DuMond, 336 U.S. 525 (1948) 24

CASES **PAGE**

Head v. New Mexico Board of Examiners,
374 U.S. 424 (1963) 21

Hughes v. Oklahoma, 441 U.S. 322 (1979) 8

Huron Portland Cement Co. v. City of Detroit,
362 U.S. 440 (1960) 10, 22

Hybud Equipment Corporation v. City of Akron,
654 F.2d 1187 (6th Cir., 1981) *vacated and remanded on other grounds,*
455 U.S. 931 (1982) 5, 16, 25

Indianapolis v. Ryan,
212 Ind. 447, 7 N.E.2d 974 (1937) 6

J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection,
857 F.2d 913 (3rd Cir., 1988) 25

Kassel v. Consolidated Freightways Corp.,
450 U.S. 662 (1981) 10, 25

L.O. Johnson v. Haydel, 278 U.S. 16 (1928) 24

Maine v. Taylor, 477 U.S. 131 (1986) 3, 10, 11, 23

Minnesota v. Clover Leaf Creamery,
449 U.S. 456 (1981) 4, 25

Parker v. Brown, 317 U.S. 341 (1943) 7, 8, 9, 16

Pike v. Bruce Church, Inc.,
397 U.S. 137 (1970) 2, 11, 12, 24, 26

Portsmouth v. McGraw,
21 Ohio St. 3d 117, 488 N.E. 2d 472 (1986) 6

CASES **PAGE**

Salt Lake City v. Bernhagen,
56 Utah 159, 189 P. 583 (1920) 6

South-Central Timber Development, Inc. v. Wunnicke,
467 U.S. 82 (1984) 24

Toomer v. Witsell,
334 U.S. 385 (1948) 8, 24

Trade Waste Management Association v. Hughey,
780 F.2d 221 (3rd Cir., 1985) 21

Waste Recycling v. Southeast Alabama Waste Disposal Authority, 814 F. Supp. 1566
(M.D. Ala., 1993) 2

Waste Systems Corp. v. County of Martin, Minn.,
985 F.2d 1381 (8th Cir., 1993) 1, 17

Waste Systems Corp. v. County of Martin, Minn.,
784 F.Supp. 641 (D. Minn., 1992) 17

STATUTES, RULES AND REGULATIONS

FEDERAL

40 C.F.R. §256.31(a)(1991) 13
42 U.S.C. §6901(a)(4) 13
42 U.S.C. §6901(b) (1) 12
42 U.S.C. §6901(b) (8) 12

MAINE

38 Me. Rev. Stat. Ann. §1304-B 15, 20

MINNESOTA

Minn. Stat. §115A.02(b) (1992) 13
Minn. Stat. §115A.55 (1992) 14
Minn. Stat. 115A.84 (1992) 15

NORTH CAROLINA

N.C. Gen. Stat. §130A-309.04 (1993) 13, 14

PAGE

OHIO
Ohio Rev. Code Ann. §§3734.50 *et seq* 14

PENNSYLVANIA
53 Pa. Stat. Ann. §§4000.101-4001.1904 (1992) 14

VIRGINIA
Va. Code Ann. §10.1-1411 (Michie 1993) 14
Va. Code Ann. §15.1-28.01 (Michie 1993) 15

MISCELLANEOUS
Ability to Finance Recycling Facilities in California Could Hinge On Court Case, The Bond Buyer, March 26, 1993 19

Jeff Bailey, *Up In Smoke: Fading Garbage Crisis Leaves Incinerators Competing For Trash*, *Wall Street Journal*, August 11, 1993 16

Jeff Bailey, *Municipal Waste Disposal Investments Undermined By Federal Court Rulings*, Wall Street Journal, March 2, 1993 ..... 16, 21

Dexter Ewel, *Flow Control and Waste Import Bans*, Biocycle, March 1993 25

Incinerators Hungry For Trash, Providence Journal-Bulletin, May 27, 1993 16

Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste At Home*, 76 Minn. L. Rev. 1219 (1992) 13, 19

PAGE

Preliminary Assessment of Regional Waste Management Capacity, Report to the Minnesota Legislature s Commission on Waste Managment, by Minnisota Office of Waste Management, July 1993, Table 7-1, p. 73 17

Service Fee Increase Likley as Prarieland Loses Garbage to Iowa, Fairmont Sentinel, March 14, 1993 18

United States Environmental Protection Agency, Office of Solid Waste, *The Solid Waste Dilemma: An Agenda for Action* (1989) 12, 16, 17, 21, 23

Validity of Municipal Regulation of Storage or Accumulation of Lumber, Straw, Trash, or Similar Inflammable Material, 64 A.L.R. 2d 1040 (1959) 5

Validity of Statutory or Municipal Regulations As To Garbage, 15 A.L.R. 287 (1921), 72 A.L.R. 520 (1931), and 135 A.L.R. 1305 (1941) 5

STATEMENT OF INTEREST

The *Amici* States urge this Court to affirm the decision below because the ability to control the flow of solid waste within a community is vital to managing solid waste in a responsible, environmentally sound manner. The solid waste crisis facing communities across this country, a crisis of critical shortages and gluts of disposal capacity and an inability to decrease reliance on landfills, has been well documented, and has been growing worse since this Court first addressed the matter in *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). In the fifteen years since that seminal case, the problems surrounding safe, environmentally sound disposal of solid waste have only become more difficult and complex.

In order to address these complex problems, both state and federal governments have established goals and mandates for solid waste management. Many states have enacted comprehensive solid waste management statutes which contain these goals and mandates. Typically, the goals and mandates are implemented on a local level. Such an arrangement respects local government's traditional primary role in handling local solid waste issues.

As part of their comprehensive programs, States have enabled local governments to control the flow of waste out of their communities. The resulting local ordinances are commonly called "flow control." While the term "flow control" is used almost uniformly in the literature on this subject, in fact the broad range of local statutes which are described by this term are anything but uniform. The ordinance under scrutiny in this case, for instance, does not direct that waste be disposed of at any one facility, but simply directs that waste be routed through a transfer station on its way to incinerators or landfills. In addition, Clarkstown's regulation is not limited to waste generated within its borders. *Respondent's Brief in Opposition to Petition for Writ of Certiorari*, p. 7. The flow control statute in *Waste Systems Corp. v. County of Martin, Minn.*, 985 F.2d 1381 (8th Cir., 1993) required that all local *organic* waste go to a local

composting facility. One of the flow control statutes in *Waste Recycling v. Southeast Alabama Waste Disposal Authority*, 814 F. Supp. 1566 (M.D. Ala., 1993) required local waste to go to an incinerator unless it was destined for interstate commerce.

Despite these differences, flow control ordinances have a common background against which they arose, i.e., resolving the solid waste management problems facing this country. The ability to designate the ultimate destination of local waste is a critical tool enabling municipalities and local governments to implement needed solutions to the solid waste dilemma. The *Amici* States have a strong interest in protecting their local governments' ability to implement these solutions.

SUMMARY OF ARGUMENT

The *Amici* States urge the Court to uphold the Clarkstown ordinance. The ordinance requires that all waste generated or disposed in Clarkstown be sent through a designated transfer facility. This ordinance is an example of a local regulation governing the flow of trash out of a community, colloquially known as flow control. As a core example of the exercise of a local government's fundamental police powers, flow control is entitled to wide deference. Further, as flow control ordinances generally regulate only local waste before it is placed into interstate commerce, they have no impact on the interstate flow of waste. They are thus distinguishable from the laws struck down in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S.Ct. 2019 (1992), *Chemical Waste Management v. Hunt*, 112 S.Ct. 2009 (1992) and *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) on Commerce Clause grounds. The Commerce Clause does not reach the local regulation of a local problem.

Even if this Court finds, however, that the local ordinance does have an impact on interstate commerce, the ordinance should still be upheld under the test established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Flow control

ordinances serve vital governmental interests, are even-handed, do not result in economic protectionism, and have minimal impact on interstate commerce. Because the significant benefits of flow control far outweigh any burden, the ordinance is a legitimate exercise of police power and should be upheld. The Clarkstown ordinance, and other ordinances like it, have been enacted as part of comprehensive state statutory programs which respond to the serious garbage disposal problems facing this country. The problems include, *inter alia*, the steadily increasing amount of waste being generated, and the need to find alternatives to landfills. Flow control ordinances are not mere attempts to protect or improve local industry or employment at the expense of interstate commerce. Even to the extent such laws attempt to ensure the viability of a designated facility, they do so as an integral part of a community's attempt to deal with its long-term waste disposal problem.

Finally, even if the Court finds that the ordinance does discriminate against interstate commerce, it should still be upheld under the standards set out in *Maine v. Taylor*, 477 U.S. 131 (1986). Clarkstown s ordinance and others like it are part of comprehensive statutory schemes which were enacted to serve critical governmental interests. As there are no other nondiscriminatory alternatives which will serve those interests, this Court should uphold the statute even if it finds the statute is discriminatory.

ARGUMENT

I. A LOCAL LAW DIRECTING THE FLOW OF GARBAGE, GENERATED OR COLLECTED LOCALLY, THROUGH A DESIGNATED TRANSFER FACILITY IS WHOLLY WITHIN THE AUTHORITY OF A LOCAL COMMUNITY TO REGULATE THE COLLECTION AND DISPOSAL OF GARBAGE, AND DOES NOT IMPACT INTERSTATE COMMERCE.

A. The Courts Have Long Respected The Authority Of Local Communities To Impose Regulations Governing The Collection And Disposal Of Local Garbage.

This Court has long recognized the power of local government to regulate the collection and disposal of the local community's waste, and has recognized that states have a "substantial interest in . . . easing solid waste disposal problems." *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456, 473 (1981). Much like a local government's provision of police and fire services, or highway maintenance, garbage disposal is a traditional exercise of local authority. Fundamentally different than a ban on the importation of out-of-state waste into neighboring private landfills, the exercise of this traditional local authority does not even concern the regulation of waste as an item of interstate commerce.

In *California Reduction Company v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306 (1905), the Court upheld a San Francisco ordinance granting to a private individual the sole and exclusive right to cremate and destroy various household, commercial, and construction wastes in the city and county of San Francisco. The ordinance also required that any such wastes be delivered to one designated crematorium operated by the grantee or his assigns.

When sued for violating this ordinance, a competing disposal company and the haulers it employed challenged the San Francisco ordinances as being in violation of the Fourteenth Amendment to the United States Constitution. This Court rejected the challenge, holding that the collection and disposal of garbage was squarely within the localities' police power. *Id.* at 318.

The Court went on to discuss in detail the many questions involved in municipal sanitation and the difficulty of solving these questions. As part of this discussion, the Court recognized, even in 1905, the numerous problems posed by the collection and disposal of waste, and acknowledged

that a local government is in the best position to provide solutions to those problems. *Id.* at 321.

The Court also specifically addressed the claims of other persons competing in the collection and disposal business. The Court noted that the "licensed scavenger," a counterpart of today's waste haulers and disposal facilities, had no "right to complain for his right to convey garbage and refuse through the public streets, . . . was derived from the public, and he was subject to such regulations as the constituted authorities, in their exercise of the police power, might adopt." *Id.* at 322. *See also Gardner v. Michigan,* 199 U.S. 325 (1905) (Court upheld, against a Due Process challenge, a law granting one individual exclusive refuse collection and disposal rights.)

Following *California Reduction Company,* courts have repeatedly upheld legislation governing the collection and disposal of local trash. In *Hybud Equipment Corporation v. City of Akron,* 654 F.2d 1187 (6th Cir., 1981) *vacated and remanded on other grounds,* 455 U.S. 931 (1982), the United States Court of Appeals for the Sixth Circuit stated:

> Control of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers. . . . If any area of the law can be said to be well settled, this one is.

654 F.2d. at 1192 *See generally, Validity of Statutory or Municipal Regulations As To Garbage,* 15 A.L.R. 287 (1921), 72 A.L.R. 520 (1931), and 135 A.L.R. 1305 (1941); and *Validity of Municipal Regulation of Storage or Accumulation of Lumber, Straw, Trash, or Similar Inflammable Material,* 64 A.L.R. 2d 1040 (1959). Courts have consistently upheld laws reserving to the community, or granting to one individual or company, the exclusive right to collect and dispose of garbage in the community. *Central Iowa Refuse Systems, Inc. v. Des Moines Metropolitan Solid Waste Agency,* 715 F.2d 419 (8th Cir., 1983) *cert. denied,* 471 U.S. 1003 (1985);

Gurtz v. San Bruno, 8 Cal. App. 2d 399, 48 P.2d 142 (1935); *Indianapolis v. Ryan,* 212 Ind. 447, 7 N.E.2d 974 (1937); *Portsmouth v. McGraw,* 21 Ohio St. 3d 117, 488 N.E. 2d 472 (1986); *Salt Lake City v. Bernhagen,* 56 Utah 159, 189 P. 583 (1920).

Throughout this century, therefore, courts have sanctioned local waste management laws nearly identical to the "flow control" ordinances now attacked as if they were a recent invention designed to impermissibly burden interstate commerce. These laws, however, did not in the past, and do not now, impermissibly impact interstate commerce.

B. Flow Control Laws Such As the Clarkstown Ordinance Do Not Impact Interstate Commerce.

In urging this Court to discard nearly a century's worth of precedent, Petitioners argue as if the Commerce Clause prevents local regulation of the collection and disposal of local trash from the moment the discarded milk carton, cardboard box, or candy wrapper leaves the hand of the consumer. This Court's decisions concerning the interstate movement of solid waste do not require such a result, however. In fact, a review of those authorities leads to the conclusion that the Clarkstown ordinance and other ordinances like it, do not even affect interstate commerce because they regulate waste that has not entered the stream of interstate commerce.

It was not until 1978 that the Court was faced with the issue of waste as an item of interstate commerce. Even then, however, in the seminal case of *City of Philadelphia v. New Jersey,* 437 U.S. 617 (1978), this Court was asked to apply the Commerce Clause to waste which had already been offered up and placed into interstate commerce. Similarly, in the more recent *Chemical Waste Management v. Hunt,* 112 S.Ct. 2009 (1992), and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources,* 112 S.Ct. 2019 (1992), the Court again reviewed statutes which attempted to regulate waste that had already left its respective community of origin and been placed into interstate

commerce. Indeed, in all these cases, the challenged legislation attempted to uniquely address certain waste *because* of the wastes' interstate and out-of-state character. None of these cases involved a local or regional community attempting to address the basic, age-old problem of collection and disposal of the waste which the community itself generates or collects.

The notion that an item has not yet entered the interstate stream and is therefore not subject to the Commerce Clause is well recognized in the decisions of this Court. Although the Court has not addressed this question in the waste context,[1] it has addressed it in the context of other substances. In *Parker v. Brown,* 317 U.S. 341 (1943), the Court was faced with a challenge to a California statute requiring raisin producers to place seventy percent of saleable raisins into a surplus pool under the control of state officials. The state officials then sold raisins from the pool when they felt it was necessary to stabilize the price of raisins. While acknowledging that ninety to ninety-five percent of the raisin crop was eventually sold in interstate and foreign commerce, the Court held that the challenged law involved regulation of *intrastate* commerce even though the raisins were headed for *interstate* commerce:

> [N]o case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce.
>
> All of these cases proceed on the ground that the taxation or regulation involved, however drastically it may affect interstate commerce, is nevertheless

[1] However, in *Philadelphia, supra,* the Court was careful to frame the question of the scope of coverage of the Commerce Clause, not as whether waste was an item of interstate commerce, but whether the "*interstate movement* of those wastes" was commerce. 437 U.S. at 621 [Emphasis added].

> not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs.

Id. at 361. The Court held that the challenged regulations were valid under the Commerce Clause because they applied to transactions "wholly intrastate before the raisins are ready for shipment in interstate commerce." *Id.* at 361.[2] In addition to finding a distinction between local and interstate commerce, the Court stated that its decision also rested on the "accommodation of the state and national interests involved." 317 U.S. at 362. Weighing these interests, the Court upheld the regulations:

> [B]ecause upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with by Congress.

Id. at 362-363. The Court noted that the production and marketing of raisins posed a problem local in character and

[2] As another example of the distinction between interstate and intrastate commerce in an item, in *Foster-Fountain Packing Co., Inc., v. Haydel,* 278 U.S. 1 (1928), striking down a Louisiana law which effectively required shrimp taken in its territorial waters by private fisherman to be processed in Louisiana, the Court nonetheless noted that the state might have "retained the shrimp for consumption and use therein. . . . But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the state necessarily releases its hold." *Id.* at 13. Only when the state terminated its control did "those taking the shrimp . . . thereby become entitled to the rights of private ownership and the protection of the commerce clause." *Id.* at 13. The Court repeated this position twenty years later in *Toomer v. Witsell,* 334 U.S. 385, 404-405 (1948). While this Court later largely discarded the theory of state ownership of natural resources, *Hughes v. Oklahoma,* 441 U.S. 322 (1979), the Court has not discarded the distinction between articles placed in interstate commerce and those not yet placed in interstate commerce.

urgently demanding state action in light of the importance of the industry and the existence of spectacular and unsettling price fluctuations. *Id.* at 363.

The waste disposal problem facing Clarkstown and other local communities across the nation is also a problem of local character urgently demanding state or local action. While Petitioners may argue they can supplant local government in its well-established role of providing for the collection and disposal of trash in that local community, such an argument ignores the traditional, judicially-recognized responsibilities and authorities of local and regional governments for the collection and disposal of garbage. Indeed, the next step for private industry would be to argue that the Commerce Clause gives them a constitutional right to compete with governments for the provision of police or sewer services. Those services, too, could be provided, for example, by an interstate security firm or sanitation company. The Commerce Clause should not limit the actions of local governments in regulating local waste that has not entered interstate commerce.

II. EVEN IF THE CLARKSTOWN ORDINANCE AFFECTS INTERSTATE COMMERCE, THE ORDINANCE, AND OTHER WASTE MANAGEMENT LAWS THAT AUTHORIZE FLOW CONTROL, ARE EVEN-HANDED LAWS THAT ARE AN INTEGRAL PART OF A STATUTORY PROGRAM TO PROTECT THE PUBLIC HEALTH AND WELFARE, AND DO NOT IMPERMISSIBLY BURDEN INTERSTATE COMMERCE.

Even if it can be shown that Clarkstown ordinance affects interstate commerce in some way, it is well established that a law does not violate the Commerce Clause merely because

it affects interstate commerce. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 448 (1960).[3] The States have retained broad regulatory authority in the area of police power matters.

Even in striking down a total ban on the importation of solid waste, the Court acknowledged that incidental burdens on interstate commerce may be unavoidable where a State legislates to protect its citizens. *Philadelphia, supra*, at 623-624. As this Court more recently expressed:

> The Commerce Clause . . . does not elevate free trade above all other values. As long as a State does not needlessly obstruct interstate trade or attempt to place itself in a position of economic isolation, [Citation omitted] . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.

Maine v. Taylor, 477 U.S. 131, 151 (1986).

In evaluating whether a given law constitutes permissible police power regulation under the Commerce Clause, the Court has not applied a mechanical or clinical approach. The Court has examined the motivation behind a challenged statute, whether it openly discriminates against interstate commerce, the local interests it serves, and the relative burden it imposes. A fundamental goal of this examination is to distinguish between those laws that are economically protectionist in nature and that attempt through parochial

---

[3] One area of permissible regulation is in matters of traditionally local concern. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981) ("A State's power to regulate commerce is never greater than in matters traditionally of local concern.") As just established, the local collection and disposal of trash is just such an area of traditional concern. Thus, even if the regulation of the collection and disposal of local trash is held to have any impact on interstate commerce, the traditionally local nature of that regulatory authority merits wide latitude under the Commerce Clause.

legislative means to protect or improve local industry or employment, from those laws that are founded upon legitimate health, welfare, or environmental concerns and only incidentally affect commerce.

Consequently, in examining and balancing these factors, the Court has used two tests. The Court has used lesser scrutiny "where a statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Such a statute "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142. In contrast, laws that openly and arbitrarily discriminate against interstate commerce as a means of responding to local concerns, or those laws "motivated solely by a desire to protect local industries from out-of-state competition," will be strictly scrutinized by the Court. *Maine v. Taylor*, 477 U.S. at 148, n. 19. Such laws may be justified, however, where a State can show that the law serves a legitimate governmental purpose that cannot be served as well by available nondiscriminatory alternatives. *Id.* at 138.

When examined under these tests, flow control ordinances fall firmly within the broad regulatory authority retained by the States for police power enactments. Such laws are integral parts of comprehensive statutory programs enacted by state and local governments for legitimate safety, health and environmental concerns to address significant problems of waste disposal. These laws are not illusory, fabricated attempts to protect or improve local industry or employment at the expense of interstate commerce. Even to the extent such laws serve a purpose of attempting to ensure the viability for a community of a given designated facility, they do so as an integral part of a community's attempt to deal with its long-term waste disposal problem.

Not only are flow control laws legitimate police power enactments designed to serve important governmental interests, they also are even-handed regulations with an only incidental impact on interstate commerce. Consequently,

they should be upheld as Petitioners cannot show that Clarkstown ordinance imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

A. The Clarkstown Ordinance And Other "Flow Control" Laws Serve Important Governmental Interests And Are Integral Parts Of Comprehensive Police Power Enactments For The Local Management Of Solid Waste.

The enormous problems facing this country in safely disposing of its solid waste have been evident for years. In 1976, Congress first enacted the Resource Conservation Recovery Act (RCRA, 42 U.S.C. 6901, *et seq.*), in response to the overwhelming solid waste disposal problems facing the country. Since that time, the combination of a "throw away society," which is continually generating more trash and the growth of the NIMBY (Not In My Back Yard) movement, which has slowed the siting of new solid waste disposal facilities, has only increased the problems. *See* United States Environmental Protection Agency, Office of Solid Waste, *The Solid Waste Dilemma: An Agenda for Action* (1989). Further contributing to the difficulties is the consistent trend to constantly produce more solid waste; more garbage was produced every successive year from 1960 to 1988, both in total tonnage and in pounds per person. *Id.* at 1.

Amidst this glut of garbage, states have come to the conclusion that this country must find alternatives to landfills, a conclusion which Congress reached when it stated that "alternatives to existing methods of land disposal must be developed." 42 U.S.C. §6901(b)(8). The problems with extensive reliance on landfills are obvious. In many areas of this country, where land is scarce, it is a terribly inefficient use of natural resources. *See* 42 U.S.C. §6901(b)(1). Historically, landfills have been cheaper to build and operate in the short run than other disposal options. There are, however, enormous long-term costs associated with landfills, including potential dangers to human health and the environment. For these reasons, when the U.S. EPA

established a "hierarchy" of waste management options, it ranked landfills last. 40 C.F.R. 256.31(a)(1991). Many states have also established similar hierarchies.[4]

Although these problems are widespread, local governments have, again, historically dealt with the resolution of garbage problems and still have primary responsibility for dealing with solid waste. Congress deliberately left the problems in local hands by declining to preempt local regulation with a national solid waste regulatory program when it enacted RCRA. 42 U.S.C. § 6901(a)(4) ("the collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies.") *See also*, Ann R. Mesnikoff, *Disposing of the Dormant Commerce Clause Barrier: Keeping Waste At Home*, 76 Minn. L. Rev. 1219 (1992).

Responding to mounting pressures of dealing with solid waste issues in an environmentally sound manner, numerous states have passed comprehensive solid waste management statutes. These statutes vary from state to state, but generally set state-wide standards and goals which are required to

[4] North Carolina has established a six tier solid waste hierarchy. In descending order the hierarchy is: waste reduction at source; recycling and reuse; composting; incineration with energy production; incineration with volume reduction; disposal in landfills. N.C. Gen. Stat. §130A-309.04 (1993). Minnesota establishes, in order of preference: waste reduction and reuse; waste recycling; composting of yard waste and food waste; resource recovery through mixed municipal solid waste composting or incineration; and, lastly, land disposal. Minn. Stat. §115A.02(b)(1992). Maine establishes the following hierarchy: waste reduction; reuse; recycling; composting; incineration; disposal in landfills. 38 Me. Rev. Stat. Ann. §2101.

be implemented on a local basis.[5] The state-wide goals often include recycling and reduction of waste. In addition, several states require local governments to engage in long-term planning. Adopting such a program is consistent with placing primary responsibility for municipal solid waste on local government.

These sweeping mandates attempt to address the roots of the solid waste problem, forcing communities to reduce the amount of trash which ends up in a landfill, thereby reducing reliance on landfills. In addition, by making communities plan for their long-term disposal capacity, the states force communities to work with landfills and incinerators realistically, in terms of ensuring adequate capacity.

As an integral part of many of these comprehensive solid waste management statutes, are the so-called flow control laws. These laws, which require waste to be delivered to designated facilities within a community, are enacted by local governments and authorized by State law to ensure that the overall goals of the comprehensive solid waste management

[5] While not an exhaustive list, the following are several examples. Ohio law requires counties to, jointly or singly, produce a plan which provides for a 25% reduction in generation of solid waste by 1994, through reduction, reuse and recycling, and to demonstrate access to at least ten years of disposal capacity. Ohio Rev. Code Ann. §§ 3734.50, *et seq.* (Page, 1993). In Pennsylvania, the goal is to recycle 25% of all municipal solid waste generated by 1997 and to produce less waste in 1997 than was produced in 1988. Pennsylvania also requires counties to demonstrate access to ten years of disposal capacity. 53 Pa. Stat. Ann §§4000.101-4001.1904 (1992). North Carolina's state goal is to reduce solid waste by 25% by 1993, and by 40% by 2001, and to achieve this goal through reduction, reuse, recycling, and composting. N.C. Gen. State § 130A-309.04 (1993). Virginia also has set escalating recycling goals, starting with 10% by 1991 and climbing to 25% by 1995. Va. Code Ann. § 10.1-1411 (Michie 1993). Minnesota requires counties to prepare comprehensive plans, including the way in which the county will meet the state goal of recycling 25% of the solid waste generated by non-metropolitan counties and 35% by metropolitan counties by 1993. Minn. Stat. §115A.551 (1992).

statutes are met.[6] In short, local governments are being handed an extremely difficult mandate to reduce, recycle and plan for long-term disposal of solid waste, and flow control is one of the few tools available to achieve the mandate.

The specific governmental interests which have led to the adoption of flow control ordinances include: the need to accurately engage in long-term planning to avoid disastrous gluts and shortages in disposal capacity; the need to decrease reliance on landfills; and the need to finance recycling and composting programs in areas where the amounts of waste generated make it difficult to attract private facilities and to finance large, costly alternatives to landfills. Each of these interests will be addressed below.

1. Flow Control Enables Local Governments To Engage In Effective Long-Term Planning.

As discussed above, one of the goals of many state statutes on solid waste management is to require local governments to engage in long-term planning. The long-term planning usually requires, *inter alia*, demonstration of access to a certain number of years of capacity. The reason for requiring such planning is obvious: to avoid solid waste disposal capacity shortages and, conversely, capacity gluts.

---

[6] Indeed, several states have expressly tied flow control to the overall purposes of solid waste management. Maine, for instance, allows municipalities to enact flow control "when the purpose and effect of such an ordinance is to gain management control over solid waste and enable the reclamation of resources, including energy, from these wastes." 38 Me. Rev. Stat. Ann. §1304-B. Virginia requires that before a county, city or town passes flow control, it must make certain findings, including that other facilities are inadequate, and that the ordinance is necessary to finance needed projects. Va. Code Ann. §15.1-28.01 (Michie 1993). Minnesota allows counties to adopt a designation ordinance only after preparing a plan which is consistent with the statutory goals. The plan must evaluate a number of criteria including whether there are less restrictive methods for ensuring an adequate supply of solid waste to the facility, and whether there are other feasible alternatives to the proposed designation. Minn. Stat. § 115A.84 (1992).

A combination of factors led to critical disposal shortages in many states. Those factors included the adoption of more stringent criteria for landfills, which resulted in the closing of many landfills; the political difficulties in building new landfills in many communities; and the ever increasing amount of garbage generated in this country. *See, Agenda for Action, supra*, p. 8. Gluts of disposal capacity, while less common, are also occurring. *See* Jeff Bailey, *Up In Smoke: Fading Garbage Crisis Leaves Incinerators Competing For Trash*, Wall Street Journal, August 11, 1993; Jeff Bailey, *Municipal Waste Disposal Investments Undermined By Federal Court Rulings*, Wall Street Journal, March 2, 1993; *Incinerators Hungry For Trash*, Providence Journal-Bulletin, May 27, 1993. An excess of disposal capacity can also have deleterious effects, including potentially driving prices down to such an extent that the disposal facility fails, leaving behind unresolved environmental and financial problems for the communities.

While such market swings may be acceptable and even desirable in traditional areas of commerce, cf. *Parker v. Brown, supra* at 363 (Court takes judicial notice of evils of market swings in upholding raisin pooling laws), the collection and disposal of garbage is too vital to the health and safety of a community. Courts have long recognized that safely collecting and disposing of garbage is a vital governmental concern, similar to providing police and fire protection. *California Reduction Company, supra; Hybud Equipment Corporation v. City of Akron, supra.*

Flow control allows a local government to avoid these destructive swings in capacity by allowing a local government to realistically assess local capacity options. The community can determine whether there exists sufficient local capacity, and if not, make plans to correct that situation.

2. Flow Control Allows A Community The Ability To Meet Its Goal Of Reducing Reliance On Landfills.

As discussed above, decreasing reliance on landfills is one of the important goals of solid waste management, both by the federal government and by many states.[7] One of the difficulties with achieving this goal, however, is that landfill disposal costs have been kept artificially low, because many old and existing landfills did not include in their up-front costs the ultimate cost of closing the landfill, monitoring the landfill during post-closure and cleaning up any post-closure environmental problems. Therefore, merely continuing to dispose of waste in the existing facilities without making long-range plans is only cheaper in the short run.

Thus if a community chooses to build or use an alternative to landfilling in order to effectuate its long-term policy choices, it must be able to implement that choice through flow control. Otherwise, short-term market forces may prevent attainment of the goals of solid waste management. The facts of *Waste Systems Corp. v. County of Martin, Minn.*, 985 F.2d 1381 (8th Cir., 1993) provide an excellent case study. In that case, two counties built a composting facility at a cost of eight million dollars. *See Waste Systems Corp. v. County of Martin, Minn.*, 784 F.Supp. 641 (D.Minn., 1992). Composting is clearly an important way to reduce the amount of waste being landfilled. *See Agenda for Action.*[8]

---

[7] For instance, Minnesota has seven resource recovery facilities and several transfer stations that take waste to resource recovery facilities, all supported by flow control ordinances (called designation ordinances in Minnesota). None of Minnesota's designating ordinances require that waste be disposed of at a landfill. *Preliminary Assessment of Regional Waste Management Capacity*, Report to the Minnesota Legislature's Commission on Waste Management, by Minnesota Office of Waste Management, July 1993, Table 7-1, p. 73.

[8] "Recycling (including composting) is the preferred waste management option to further reduce potential risks to human health and the environment, divert waste from landfills and combustors, conserve energy, and slow the depletion of nonrenewable resources." *Agenda for Action*, p.2.

Nonetheless, the local ordinances were successfully challenged by an out-of-state landfill operator on Commerce Clause grounds. Thus, the local government's difficult choice to require that its citizens' waste be sent to the compost facility at an increased cost was overridden. The result is that approximately 25 to 30 tons of garbage per day are going to a landfill instead of a compost facility. *Service Fee Increase Likely As Praireland Loses Garbage To Iowa*, Fairmont Sentinel, March 14, 1992. The cheapest form of disposal is being used without consideration of environmental impacts or future capacity needs.

The attempt to shift solid waste disposal away from landfills is difficult, especially given the deceptively low apparent costs of landfilling. However, numerous governmental bodies have realized that in the long run such a move is necessary. Flow control is an important tool for achieving that difficult goal.

3. Flow Control Is Necessary To Finance Alternative Facilities.

Because landfill disposal costs remain deceptively and artificially low, it is difficult to build much needed, environmentally superior, long-term alternatives. This is true especially in areas where the flow of waste is low, or if a community or group of communities want to build an expensive, state-of-the-art facility. Obtaining the financing is difficult if the waste producers to be served by the alternative facility can choose to simply go to a cheaper, environmentally less sound landfill.

In some communities, flow control ordinances are the only way to attract private facilities for recycling and composting, or to finance construction of their own. In large urban areas, the flow of waste available makes it easier to finance a materials recovery facility, a composting facility, or other recycling facility. However, in some areas, the amount of waste available may make the economics of building and operating such a facility difficult. If the community can guarantee that all of the waste generated in the area will

be delivered to the facility, then the economics improve and the long-term viability of such a facility is more likely. Without flow control, it remains more likely that certain parts of the country will remain unserved by such facilities, defeating that community's ability to meet its recycling and composting mandate.

Flow control also enables communities to build expensive solid waste facilities that may not be feasible absent flow control, but which are environmentally superior to landfilling. Without a guaranteed flow of waste into the facility, it may become impossible to build such facilities even though alternatives to landfills may be less expensive to society in the long run. *See, Ability to Finance Recycling Facilities in California Could Hinge On Court Case,* The Bond Buyer, March 26, 1993; *see also Disposing of the Dormant Commerce Clause, supra.*

These last two reasons for enacting flow control, providing the means for some communities to provide for any alternatives to landfilling and providing the means for some communities to undertake ambitious alternative projects, have often been expressed by various legislatures in economic terms. The wording of such legislation has led to the false charge that these statutes are "economic protectionism". As discussed below, these statutes are not designed to protect a desirable industry; they are designed to enable a community to deal with a necessary evil, the garbage it generates. Nonetheless, in order to meet the mandate and achieve the vital goals of solid waste planning, a realistic view of the economics of solid waste disposal is needed.

The intertwining of the important governmental goals and the realities of the economics is demonstrated by Maine's statute enacting solid waste management including the ability for local governments to create flow control:

> [T]he State requires each municipality to provide for disposal services for domestic and commercial solid waste generated within the municipality. Solid waste contains valuable resources, including energy. . . . Energy recovery technology is complex and the equipment requires a steady supply of waste to operate efficiently. . . . *In order to make these energy recovery facilities financially feasible, and thereby simultaneously improve the environmental impacts and the economics of municipal solid waste disposal, municipalities shall have the legal authority to control the handling of solid wastes generated within their borders.*

38 Me. Rev. Stat. Ann. §1304-B(1) (emphasis added.). The statute goes on to expressly authorize municipalities to enact flow control "when the purpose and effect of such an ordinance is to gain management control over solid waste and enable the reclamation of resources, including energy, from these wastes." 38 Me. Rev. Stat. Ann. 1304-B(2). Thus, even though a statute might discuss flow control in terms of increasing the economic viability of a facility, it is clear that the underlying reason for the statute is fundamentally environmental, but because of high capital costs of alternative facilities, there are necessarily economic implications. As will be discussed in the next section, those costs will be borne by local citizens rather than out-of-state citizens.

Flow control serves vital government interests.[9] In short, flow control ordinances are being passed by communities as part of an overall effort to comprehensively deal with the solid waste crisis. Communities are under difficult mandates

---

[9] The government's legitimate and paramount concern with long-term solutions to the problems of solid waste disposal in order to safeguard its citizens stands in contrast to industry's concerns. *Amici* National Solid Waste Management Association's ("NSWMA") brief states that flow control leads to inefficient and environmentally unsound waste disposal. The implication is clearly that the area of regulating flow control should be left to private market forces, engaged in fair competition. The irony of this argument is twofold: first, left to its own devices, the industry failed to avert the solid waste crisis facing this country; second, the industry has been plagued with serious antitrust and price-fixing problems.

to reduce their waste, increase their recycling, and generally plan for their long-term solid waste needs. The Commerce Clause clearly recognizes that such ordinances,which are even-handed and have only incidental burdens on interstate commerce, are valid.

B. Flow Control Statutes Are Lawful Even-Handed Regulations And Are Not Economic Protectionist Measures.

Not only do flow control statutes serve important governmental police power interests, but these laws do so in an even-handed manner. "Even-handedness" does not require that there be no impact on interstate commerce, but only that the challenged legislation apply equally to persons and items of commerce, regardless of the origin of the item of commerce. In *Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963), for example, the Court upheld a New Mexico statute that proscribed price advertising on optical goods. The Court reviewed the statute as an even-handed statute because it applied equally to all such advertising

---

[9] *Footnote 9 cont.*

The purported efficiencies of private industry did not forestall the national capacity crisis, and have not resulted in meeting national goals in dealing with solid waste. Indeed, although there has been a national policy supporting waste reduction and recycling and urging a decreased reliance on landfills since 1976, 80% of the waste in this country is landfilled and only 10% is recycled. *See Agenda for Action, supra.*

In addition, industry's argument concerning fair competition rings hollow in light of the fact that the solid waste industry has been plagued with anti-trust violations. *See* Jeff Bailey, *Municipal Waste Disposal Investments Undermined By Federal Court Rulings*, Wall Street Journal, March 2, 1993 ("A series of successful civil and criminal price-fixing cases against the two largest haulers, Waste Management Inc. and Browning-Ferris Industries, furthered the distrust [of local officials].") *See also Trade Waste Management Association v. Hughey*, 780 F.2d 221, 223 (3rd Cir., 1985) (which describes the development of New Jersey's solid waste law against a background of organized crime, price-fixing, and extortion.)

within the borders of New Mexico, whether applied to price advertising was done by a New Mexico optometrist or an out-of-state optometrist. In *Huron, supra,* the Court upheld boiler regulations as even-handed, as uniformly applied to ships engaged in interstate commerce.

Ordinances that direct that all waste in a locality go to a designated facility are similarly evenhanded, in that they generally apply equa.ly to all waste generated or collected within the community. There is no arbitrary or disparate treatment for waste coming from outside the State. Nor do such ordinances apply only to waste purportedly targeted for out-of-state disposal as opposed to in-state disposal. Finally, the fee charged at the designated facility is even-handedly assessed.

Flow control also displays none of the attributes of laws invalidated by this Court as "economic protectionist" measures. The Clarkstown ordinance, for example, does not display the type of discrimination struck down in *City of Philadelphia, Fort Gratiot, and Chemical Waste Management.* In those cases, the challenged legislation expressly treated out-of-state waste differently and less advantageously than in-state waste. In *City of Philadelphia and Fort Gratiot,* the challenged statutes banned out-of-state waste, but did not ban in-state waste from going into in-state or in-county landfills. In *Chemical Waste Management,* the challenged statute charged one fee for in-state waste disposed at in-state facilities and a substantially larger fee for waste generated out-of-state. Consequently, the critical inquiry was whether there was a difference between out-of-state waste and in-state waste, other than place of origin, sufficient to justify the difference in treatment. Either by concession, *Philadelphia,* at 629, or lack of evidence, no such justifiable difference was found.

This Court nevertheless recognized in *Philadelphia* that a State could act to reduce the flow of *all* waste even though interstate commerce may be incidentally affected. 437 U.S. at 626. It was the arbitrary discrimination of the regulation

which was objectionable. That discrimination does not exist here.

Flow control statutes are also fundamentally different from importation bans and statutes in that flow control laws do not try to cut off local resources from enjoyment by out-of-state citizens and do not seek to hoard a positive benefit such as disposal capacity. In *Fort Gratiot, supra*, this Court found a solid waste import ban to be unconstitutional, because it sought to isolate a State from the national economy and conserve local waste disposal capacity from out-of-state generators seeking to use the same disposal capacity. *Id.* at p. 2024. In contrast, the Clarkstown ordinance and other flow control ordinances do not put local waste generators at any advantage over out-of-state waste producers.

The flow control ordinances are also not "motivated solely by a desire to protect local industries from out-of-state competition." *Maine v. Taylor, supra* at 148, n. 19 . Flow control laws have neither the design nor effect of protecting or promoting local industry. *Amici* States agree with Petitioners' assessment that initially no local community wanted trash, a desire that led to import bans and other discriminatory legislation, much of which has been struck down by the courts. However, Petitioners, statements become illusory where they claim that some communities have changed their minds and now want trash. No community wants trash or the problems it creates.[10] It is inappropriate, therefore, to compare flow control laws to the numerous "local processing" cases where the States were motivated by economic protectionist reasons. *Pike v. Bruce Church, Inc.*,

[10] As noted in *Agenda for Action, supra*, the "First Law of Garbage is: 'Everybody wants us to pick it up, and nobody wants us to put it down.' Many Americans want their trash to disappear quickly and quietly from their backyards and curbs, never to be seen or heard from again. And the *last* thing they want in their neighborhoods is a landfill, combustor or recycling center—all of which are associated in the public mind with noxious odors, possibly dangerous pollution and noisy traffic." *Id.* at p.8.

397 U.S. 137 (1970); *H.P. Hood & Sons v. DuMond*, 336 U.S. 525 (1948); *Foster-Fountain Packing Co., Inc. v. Haydel*, 278 U.S. 1 (1928); *L.O. Johnson v. Haydel*, 278 U.S. 16 (1928); *Toomer v. Witsell*, 334 U.S. 385, 405 (1948); and *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984).

In these "local processing" cases, the challenged statutes had the stated or readily apparent purpose to promote or protect local industry and employment in those industries. *Pike v. Bruce Church, Inc., supra* (Law designed to promote reputation of local growers); *H.P. Hood & Sons v. DuMond, supra* (Law designed to prevent competition with local milk producers); *Foster-Fountain Packing Co., Inc. v. Haydel, supra, L.O. Johnson v. Haydel, supra*, and *Toomer v. Witsell, supra* (laws requiring local packing by in-state private industry to promote local employment and income of local shrimp, oyster or fish industry); and *South-Central Timber Development, Inc. v. Wunnicke, supra* (law mandates local processing of Alaskan timber placed on the open market to promote local processing of timber)."

It is to reduce health and safety risks, not to increase employment in the trash industry or to attract these businesses for commercial or economic reasons, that local communities have chosen flow control. Given a free choice, no community wants these businesses. Communities have only decided to provide for or participate in such facilities after examining (at their own initiative or pursuant to state mandate) the full health and environmental effects of a failure to fully plan management of the community's waste.

Another indication that flow control laws are not economic protectionist, is that comprehensive solid waste statutes including flow control almost invariably increase the local costs of disposal. *See* Dexter Ewel, *Flow Control and Waste*

[11] Moreover, in these cases there is no element of the historical central role played by local government in regulating the items of commerce at issue, as there is with waste collection and disposal. There is simply no governmental counterpart in the fish or shrimp canning or timber processing industries.

Import Bans, Biocycle, March 1993. This increase is based on a number of factors, including that the designated facility is often more environmentally protective, and thus more expensive than cheaper, less protective alternatives.

Consistent with these increased costs, perhaps the best evidence that flow control ordinances are not economic protectionism is that the persons bearing the brunt of such laws are those with the political power to change them. As this Court has noted, a statute which burdens the State's own citizens does not raise the same Commerce Clause considerations as one which advances its own citizens at the expense of other States. *Kassel v. Consolidated Freightways, supra.* The reason is obvious - the State's voters will ensure that the regulations do not become too burdensome.[12] If a statute favors local interests at the expense of non-voting outsiders, there is nothing in the state political process to slow down the regulations.

In the case of flow control, however, local communities are bearing the financial brunt of their own decisions. As the United States Court of Appeals for the Sixth Circuit Court of Appeals recognized in upholding flow control regulations in *Hybud, supra*, there is a critical difference between such regulations and the import ban struck down in City of Philadelphia:

> It [the flow control ordinance] is not special interest legislation that discriminates against out-of-town people who vote elsewhere in favor of local residents and local voters. The economic costs of

[12] In *Kassel, supra*, at 1319, the Court noted that where the economic burden falls on local economic interests, as well as other states' economic interests, the "State's own political processes will serve as a check against unduly burdensome regulations." In addition, the "existence of major in-state interests adversely affected by the [law] is a powerful safeguard against legislative abuse." *Clover Leaf Creamery Co., supra* at 473, n. 17; *accord J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection*, 857 F.2d 913 (3d Cir., 1988).

> the Akron measure fall hardest on people who generate and collect garbage in the City of Akron.

654 F.2d at 1194-1195. Similarly, the Clarkstown ordinance should be upheld as it too is not an "economic protectionist" law which transfers the burden of the law to interstate commerce.

C. The Clarkstown Ordinance And Flow Control Laws In General Do Not Impose A Burden On Interstate Commerce That Is Clearly Excessive In Relation To The Benefits Of Those Laws.

The successful challenger of even-handed legislation must show, not just the existence of *any* impact on interstate commerce, but a burden that is "clearly excessive in relation to the putative local benefits." *Pike, supra*, at 142. Petitioners have failed to make such a showing. The Amici States generally concur with the arguments of Respondent addressing the purported impacts of the specific Clarkstown ordinance on interstate commerce. A few points of general relevance to flow control laws should be mentioned, however.

The purported burden of a higher fee at a designated facility is not an impermissible burden on interstate commerce. A higher fee, when and if it exists, is generally a reflection of the true long-term cost of the community's waste disposal problem. Those costs discussed in Section II.A. of this Amicus Brief—gluts and shortages in disposal capacity, inability to plan for waste disposal needs, high threshold costs for disposal and recycling facilities, inability to direct wastes to landfilling alternatives—are all part of the true long-term cost of waste disposal which flow control laws attempt to address.

Moreover, any higher fee charged when a community channels waste through a designated facility is primarily a cost borne by the local citizens of the community imposing the flow control restriction. This is wholly unlike the cost that may be added to, say, fish or shrimp or timber that is forced to be processed locally. That added cost is *carried*

with the product into interstate commerce and is borne by the *interstate consumer* of the good. With trash, there is no interstate *consumer* of trash, only purveyors of disposal or recycling capacity. The price of their disposal or recycling capacity, however, will not change depending on whether the local community has channeled the waste through a transfer facility and assessed themselves the added cost of that facility designation.

Claiming that a higher fee will cause more illegal dumping, as Petitioners argue, is pure speculation. Designation of a facility, and the attendant improvement in knowledge as to how much waste is being generated, may *improve* enforcement efforts against illegal disposers.[13]

Flow control also will not eliminate price competition or discourage new entry into the waste disposal business in an area. Nothing will prevent a community from recognizing a cheaper or more environmentally efficient way of disposing or recycling of waste. In small communities, flow control can even encourage entry as it allows a sufficient stream of recyclable or other waste to be consolidated so as to make it worthwhile for a private facility to address the market.

Finally, to the extent that an added cost is borne by out-of-state waste as a result of a flow control provision, such a burden is permissible under the Commerce Clause. This Court has repeatedly stated that the Commerce Clause does not relieve those engaged in interstate commerce from bearing their fair share of the cost of state government. *Dept. of Revenue of the State of Washington v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 745, 748 (1978); *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977); *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 108 (1975). The fair share pronouncements of this Court in these cases, and in cases such as *Philadelphia* that a State can choose to slow the

[13] Moreover, even if there was an increase in illegal dumping, Petitioners do not state how that increase burdens interstate commerce or how it even relates to the analysis under the Commerce Clause.

flow of *all* waste, make clear that the Commerce Clause does not elevate interstate commerce in waste to a regulation-free status.

III. EVEN IF THIS COURT FINDS THAT FLOW CONTROL STATUTES ARE DISCRIMINATORY, THEY SHOULD STILL BE UPHELD BECAUSE THERE ARE NO NONDISCRIMINATORY ALTERNATIVES WHICH ALLOW GOVERNMENT TO ACHIEVE ITS IMPORTANT SOLID WASTE MANAGEMENT GOALS.

Even if this Court were to find that flow control ordinances discriminate against interstate commerce, this regulation should still be upheld. As has been demonstrated, *supra*, flow control ordinances clearly serve numerous, important governmental interests. The next question becomes whether these interests can be served as well by nondiscriminatory alternatives. Petitioners suggest that alternatives include keeping the designated facility competitive in the market and raising taxes as needed to subsidize the facility.

Amici States will again concur with the arguments of Respondent in support of the Clarkstown ordinance. As a general response, however, the Amici States emphasize that flow control laws serve governmental interests in planning, in directing the local waste stream to environmentally superior landfills and to recycling or other landfill alternatives, that a simple tax assessment cannot. In addition, a tax does not encourage the reduction of waste as requiring customers to pay the true cost of waste disposal does. As a mechanism for addressing the cost of waste management, flow control can serve to charge directly to the waste problem the true costs of long-term and environmentally sound waste management. In short, flow control laws, better than a simple tax subsidy, allows a community to build or use the type of facility it feels is the most appropriate in meeting its mandated goals.

CONCLUSION

For the foregoing reasons, the *Amici* States urge this Court to affirm the lower court decision on behalf of Respondent Clarkstown.

Respectfully submitted,

LEE FISHER
Attorney General of Ohio

By: **SUSAN E. ASHBROOK**
Assistant Attorney General
Environmental Enforcement Section
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-2766
Counsel of Record for Amici States

BRYAN F. ZIMA
Assistant Attorney General
Co-Counsel.

Supreme Court, U.S.
FILED
AUG 25 1993
OFFICE OF THE CLERK

No. 92-1402

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

C & A CARBONE, INC.,
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and ANGELO CARBONE,
Petitioners,

v.

TOWN OF CLARKSTOWN,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT, APPELLATE DIVISION,
SECOND DEPARTMENT, OF THE
STATE OF NEW YORK

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF BOND LAWYERS IN SUPPORT OF RESPONDENT

C. Baird Brown
Counsel of Record
Robert B. McKinstry, Jr.
Brendan K. Collins
BALLARD SPAHR ANDREWS
& INGERSOLL
1735 Market Street, 51st Floor
Philadelphia, PA 19103-7599
(215) 665-8500

Counsel for Amicus Curiae

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
Table of Authorities	iii
I. THE INTEREST OF THE NATIONAL ASSOCIATION OF BOND LAWYERS	1
II. SUMMARY OF ARGUMENT	2
III. STATEMENT OF THE CASE	3
A. The Facts in this Case	3
B. The Economic Forces Underlying the Creation of the Waste Disposal Services Market	5
C. The History of Waste Collection and Disposal Services	7
D. Institutional Means to Provide and To Finance Waste Disposal Services	11
E. Related Municipal Services	16
IV. ARGUMENT	17
A. Congress Has Authorized State And Local Governments To Impose Waste Flow Controls, Which Are Therefore Not Prohibited By The Dormant Commerce Clause	17
B. Waste Flow Control Legislation Should Be Upheld Under The *Pike* Balancing Test	23
1. Principles of Federalism Favor Upholding State Authority to Impose Waste Flow Control	23
2. Waste Flow Control Legislation Serves Strong Local Interests Which Outweigh Its Effect on Commerce	24
V. CONCLUSION	30

APPENDIX

Excerpts From Act of February 18, 1769, 1 Laws of the Commonwealth of Pennsylvania 284, 287, 297 ..... A-1

Excerpts From Official Statement, $325,985,000 Northeast Maryland Waste Disposal Authority Solid Waste Revenue Bonds (Montgomery County Resource Recovery Project) Series 1993A (March 31, 1993) A-4

Excerpts From Official Statement, $135,600,000 Lancaster County Solid Waste Management Authority Resource Recovery System Revenue Bonds, Series A of 1988 . A-30

Excerpts From Lancaster County, Pennsylvania, Solid Waste Management Plan, 1986 ..... A-52

TABLE OF AUTHORITIES

Cases: Page

A.A. Mastrangelo, Inc. v. Commissioner, Dep't of Envtl. Prot., 449 A.2d 516 (N.J. 1982) 21

Asson v. City of Burley, 670 P.2d 839 (Idaho 1983), *cert. denied sub nom. Chemical Bank v. Asson*, 469 U.S. 870 (1984) 12

Chemical Bank v. Washington Public Power Supply System, 666 P.2d 329 (Wash. 1983) 12

Clarkstown v. C & A Carbone, 587 N.Y.S.2d 681 (N.Y. App. Div.), *app. denied*, 605 N.E.2d 874 (N.Y. 1992), *cert. granted*, 113 S. Ct. 2411 (1993) 29

DeFazio v. Washington Public Power Supply System, 679 P.2d 1316 (Or. 1984) 11

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 112 S. Ct. 2019 (1992) 25

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).... 17, 23, 24

Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976) 24, 29

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333 (1977) 27

In re Southeast Arkansas Landfill, 981 F.2d 372 (8th Cir. 1993) 19

J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection, 857 F.2d 913 (3d Cir. 1988) 27

Maine v. Taylor, 477 U.S. 133 (1986)..... 27

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982) .. 17

Philadelphia v. New Jersey, 437 U.S. 617 (1977) 25

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 3, 24, 25, 26, 27, 29, 30

Cases: Page

Reeves, Inc. v. Stake, 447 U.S. 429 (1979) 24

South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) 17, 18

United Building and Construction Trades Council v. Camden, 465 U.S. 208 (1984) 24

Vermont Dept. of Public Service v. Massachusetts Mun. Wholesale Electric Cooperative, 558 A.2d 215 (Vt. 1988), *cert. denied*, 493 U.S. 872 (1989) 12

Waste Systems Corp. v. County of Martin, 985 F.2d 1381 (8th Cir. 1993) 10, 20

White v. Massachusetts Council of Construction Employers, Inc., 460 U.S. 204 (1983) 24

Constitutions & Statutes:

U.S. Const. art. I, § 8 ..... 2, *passim*

26 U.S.C. § 103(a) (1988) 1

26 U.S.C. § 103(b) (1988) 1

26 U.S.C. § 141(a) (1988) 1

26 U.S.C. §§ 141(e)(1)(A) (1988) 1

26 U.S.C. § 142(a)(6) (1988) 1

33 U.S.C. § 1281(e) (1988) 14, 16

33 U.S.C. §§ 1281(h)(2) (1988) 16

33 U.S.C. § 1284(b) 16

42 U.S.C. §§ 6901-6992k (1988) 2

42 U.S.C. § 6901(a)(4) (1988) 9

42 U.S.C. § 6901(b)(7) (1988) 9

42 U.S.C. § 6941 (1988) 22

42 U.S.C. § 6941a (1988) 9, 21

Constitutions & Statutes: Page

42 U.S.C. § 6943(a) (1988) 9

42 U.S.C. § 6943(a)(2) (1988) 9

42 U.S.C. § 6943(a)(4) (1988) 18, 20

42 U.S.C. § 6943(a)(5) (1988) 12, 18

42 U.S.C. § 6946 (1988) 18

42 U.S.C. § 6947 (1988) 18

42 U.S.C. § 6948(d)(3) (1988) 15

42 U.S.C. § 6949 9

42 U.S.C. § 6949a(c) (1988) 10

42 U.S.C. §§ 7401-7671q (1988) 9

Pub. L. No. 98-616, § 302(a)(1), 98 Stat. 3267 (1984) 10

Pub. L. No. 96-482, § 32(b)(3), 94 Stat. 2355 (1980) 21

Ariz. Rev. Stat. Ann. § 9-511 (1990) 13

Ariz. Rev. Stat. Ann. § 9-516 (1990) 13

Conn. Gen. Stat. § 7-339a (1992) 12

Del. Code Ann. tit. 7, § 6403 (1991) 21

Del. Code Ann. tit. 7, § 6404 (1991) 21

Del. Code Ann. tit. 7, § 6406(a)(31) (1991) 21

Ind. Code Ann. § 36-9-31-4(a) (Burns 1993) 12

N.J. Stat. Ann. § 40:56-52 (West 1992) 16

N.J. Stat. Ann. §§ 40A:26A-10 to -14 (West 1993) 16

N.J. Stat. Ann. § 48:13A-5 (West Supp. 1993) 13

N.Y. Envtl. Conserv. Law § 27-0105 (McKinney Supp. 1993) 9

Constitutions & Statutes: Page

N.Y. Envtl. Conserv. Law § 27-0107 (McKinney Supp. 1993) 3, 12

N.Y. Local Fin. Law § 135-3-a, -b (McKinney 1968) 11

N.Y. Town Law §§ 198(9) (McKinney 1984) 4

N.Y. Town Law §§ 198(1)(g)-(k) (McKinney 1968) 16

N.Y. Town Law § 201 (McKinney 1968) 16

N.Y. Town Law § 202 (McKinney 1968) 16

N.Y. Town Law § 202-a (McKinney 1968) 16

N.Y. Town Law § 221(1) (McKinney 1984) 4

1991 N.Y. Laws ch. 369, § 1, ch. 540, § 1, ch. 569, § 1, & ch. 631, § 1 12

1991 N.Y. Laws ch. 569, § 1 ..... 12, 26

Pa. Stat. Ann. tit. 53, § 306(B)(j) (Purdon 1974) 11

Pa. Stat. Ann. tit. 53, § 4000.303(e) (Purdon Supp. 1993) 12

Pa. Stat. Ann. tit. 53, § 4000.304(c) (Purdon Supp. 1993) 12

Pa. Stat. Ann. tit. 53, § 23308.1 (Purdon Supp. 1993) 11

Pa. Stat. Ann. tit. 53, § 36901(b) (Purdon Supp. 1993) ... 11

Pa. Stat. Ann. tit. 53, §§ 47043-47064 (Purdon 1966) 16

Pa. Stat. Ann. tit. 53, § 53202(a) (Purdon Supp. 1993) ... 11

Pa. Stat. Ann. tit. 53, § 56802(a) (Purdon Supp. 1993) ... 11

Pa. Stat. Ann. tit. 53, § 65802 (Purdon Supp. 1993) 11

Act. of Feb. 18, 1769, ch. DXCIV, 1 Laws of Pa. 284 ... 7

Act of August 10, 1764, *reprinted in* South Carolina Gazette, Aug. 25, 1764 7

1973 Wisc. Laws ch. 305, § 11 21

Constitutions & Statutes: Page

Town of Clarkstown, N.Y., 1990 Local Laws, No. 9, § 3 C. & D. ..... 4, *passim*

Administrative Materials:

40 C.F.R. pt. 258 (1992) 10

40 C.F.R. § 258.40 (1992) 10

56 Fed. Reg. 50978 (Oct. 9, 1991) 10

58 Fed. Reg. 40568 (July 28, 1993) 10

N.J. Admin. Code tit. 7, ch. 26, subch. 2A (1993) 10

25 Pa. Code ch. 273 (1993) 10

Miscellaneous Materials:

H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. I (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238 ..... 9, 19, 20

C. Baird Brown & Charles S. Henck, *Structuring Municipal Solid Waste Financing in Municipal Solid Waste Disposal Strategies, Environmental Regulation, and Contracts and Financing* (American Law Institute – American Bar Association 1992) 13

The Bond Buyer, Feb. 1, 1993, at 8A, col. 1 2

The Bond Buyer, July 26, 1993, at 10A, col. 1 2

Diane Buxbaum & Daniel Baumol, *Service Arrangements for Conventional Disposal, in Evaluating the Organization of Service Delivery: Solid Waste Collection and Disposal* (E.S. Savas and Barbara J. Stevens eds., 1977) (*"Savas & Stevens"*) 5, 8

Franklin R. Edwards and Barbara J. Stevens, *Local Government Regulation of Residential Refuse Collection By Private Firms, in Savas & Stevens* 6

Maud W. Goodwin, *Dutch and English on the Hudson* (1919) 7

Miscellaneous Materials: Page

Ernest S. Griffith, *History of American City Government, the Colonial Period* (1938) (Da Capo Press 1972) 7

William W. Locke and Joseph B. Taylor, *Reports of I. Garbage Disposal in the Outlying Wards, II. History of the Garbage Contract, III. Refuse Disposal Cities* (1896) (available from Univ. of Chicago Library, Preservation Dept., Negative No. N6958)..... 8

Stephen M. Lounsberry, *The Scope and Basis of the Local Finance Law,* N.Y. Local Fin. Law at VII (McKinney 1968) 11

James Madison, *The Federalist* No. 45 (Clinton Rossiter ed., 1961) 23

Martin V. Melosi, *"Out of Sight, Out of Mind" The Environment and Disposal of Municipal Refuse, 1860-1920,* 35 Historian 621 (1973)..... 8

Martin V. Melosi, *Pollution and Reform in American Cities, 1870-1930* (1980) 8

Robert B. McKinstry, Jr., Winifred M. Prendergast and Thomas F. Doyle, *Recycling and Waste Reduction: The Other Half of Municipal Waste Management, in Municipal Solid Waste Disposal Strategies, Environmental Regulation, and Contracts and Financing* (American Law Institute-American Bar Association 1990) 6

Christopher Niemczewski, *The History of Solid Waste Management, in Savas & Stevens* 7

E. S. Savas, *The Organization of Solid Waste Collection: Findings, in Savas & Stevens*..... 8

U.S.E.P.A., *The Solid Waste Dilemma: An Agenda for Action, Background Document* (1988) 9

I. THE INTEREST OF THE NATIONAL ASSOCIATION OF BOND LAWYERS

The National Association of Bond Lawyers ("NABL") is an organization of lawyers whose practices involve the issuance of debt obligations by state, local and regional governmental entities. NABL's members frequently serve as bond counsel in municipal finance transactions, providing opinions to purchasers of bonds for the benefit of issuing states and political subdivisions that bonds are properly issued and that other governmental actions in connection with a financing are properly authorized and enforceable. NABL's principal functions include the provision of educational programs and activities to clarify and to strengthen the legal basis for municipal finance.

Under federal tax law, solid waste disposal facilities are eligible for tax-exempt financing.[1] Local jurisdictions may choose to own and to operate their own facilities or to contract for the construction and operation of facilities by private parties. In either case, both publicly and privately owned facilities are typically financed through the issuance of tax-exempt bonds. In connection with the development and financing of such facilities local jurisdictions frequently enact waste flow control legislation similar to that enacted by Clarkstown, New York, which is the subject of this case. This type of legislation requires waste collectors to deliver waste from the local jurisdiction to the facility that the jurisdiction owns or has contracted with to provide services to its citizens. Waste flow control legislation is the mechanism through which the local jurisdiction procures disposal services.

Similar patterns of legislation are common in connection with the development and financing of water systems and sewage treatment systems. Such legislation provides the flow of

1. Gross income generally excludes interest on any state or local bond. 26 U.S.C. § 103(a) (1988). This exclusion does not apply to any bond that is a "private activity bond" (as defined in 26 U.S.C. § 141(a) (1988)) which is not a "qualified bond." 26 U.S.C. § 103(b) (1988). The term "qualified bond" includes any "exempt facility bond," which includes any bond whose proceeds are used to provide solid waste disposal facilities. 26 U.S.C. §§ 141(e)(1)(A), 142(a)(6) (1988).

revenues necessary to secure payment of debt service for bonds issued to finance solid waste, water and sewage facilities. This litigation calls into question the enforceability of waste flow control legislation. Reversal of the holding of the New York courts would undermine the security for billions of dollars of bonds[2] and weaken the ability of local jurisdictions to provide essential governmental services to their citizens.

II. SUMMARY OF ARGUMENT

Petitioners assert that a local law requiring that all waste generated within the boundaries of the enacting jurisdiction be taken to a particular solid waste facility for processing or disposal violates the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8. Under the "dormant Commerce Clause" doctrine, state and local laws which discriminate deliberately against out-of-state goods or services or which adversely affect interstate commerce in a manner clearly disproportionate to the local benefits they provide violate the Commerce Clause.

The Court should affirm the decision of the court below for several reasons. First, the dormant Commerce Clause is inapplicable when Congress has authorized the states to adopt the type of laws at issue. The Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6901-6992k (1988), authorizes the adoption of waste flow control legislation to effectuate Congress' mandate that state and local governments be authorized to enter into long-term contracts for the supply of waste to solid waste facilities and that the federal government assist state and local governments in securing the flow of waste to those facilities.

Second, the procurement of waste disposal services by a local government for and on behalf of its citizens has fallen within the power of local governments since the seventeenth century. The Commerce Clause was not intended to usurp this

2. In 1992, state and local jurisdictions in the United States issued $2,997,500,000 in solid waste bonds. The Bond Buyer, Feb. 1, 1993, at 8A, col. 1. Solid waste bonds are being issued at an even higher rate in 1993, with $2,009,200,000 issued in just the first half of the year. The Bond Buyer, July 26, 1993, at 10A, Col. 1.

traditional power to provide or to procure exclusive public services in areas affecting public health. This consideration should weigh heavily in favor of upholding waste flow regulation under the balancing test enunciated by the Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Waste flow control legislation is adopted to advance legitimate local public interests: it ensures that all solid waste from the adopting municipality is disposed of in an environmentally sound manner, protects the public health from the threats posed by improper waste disposal services while protecting the public fisc, and serves to compel payments from citizens of the jurisdiction for waste disposal. Such legislation has no discriminatory intent and little impact on interstate commerce. Exclusive municipal provision of disposal services is often necessary to ensure long-term, environmentally sound solid waste disposal. As a means of implementing a municipality's decision to provide exclusive disposal services, waste flow control legislation is the mechanism least disruptive of the waste collection market.

III. STATEMENT OF THE CASE

A. The Facts in this Case.

Petitioners challenge the ability of a local government in New York to select and to provide waste disposal services to its residents. New York law authorizes local governments to prepare solid waste management plans providing for the proper disposal of all solid waste generated within their jurisdictions. N.Y. Envtl. Conserv. Law § 27-0107 (McKinney Supp. 1993). Clarkstown, having been forced by the state to close a landfill it owned and to provide for alternative disposal services, entered into a contract with Clarkstown Recycling, Inc., for the construction and operation of a transfer station. Pet. App. 4a, 35a; J.A. 10, R. 59.

Under this contract, Clarkstown guarantees that at least 120,000 tons of waste will be delivered to the facility each year. *Id.* If the facility receives less than 120,000 tons of waste in a given year, Clarkstown is obligated to pay Clarkstown Recycling $81 for each ton by which deliveries fall short of the minimum, less the marginal operating costs Clarkstown Recycling would

have incurred to process the missing waste. *Id.* Under this "put-or-pay" contract, to the extent the facility's disposal fee revenue is less than $9.72 million, Clarkstown is contractually obligated to pay Clarkstown Recycling the difference, less Clarkstown Recycling's marginal costs. *Id.*

To protect the public fisc to the extent feasible and to assure that its contractual obligations would be met, Clarkstown required that its citizens' waste be delivered to the designated facility for a fixed "tipping fee" by adopting Local Law 9 ("Clarkstown Law"), which is the subject of this dispute.[3] Rather than adopting waste flow control legislation, Clarkstown could have purchased trucks, hired employees, collected the waste from its own citizens and delivered it to the transfer station. It could have entered into a contract with a hauler to collect all the waste from its citizens and to deliver it to the transfer station. *See* N.Y. Town Law §§ 198(9), 221(1) (McKinney 1984). Clarkstown chose instead a mechanism that does not restrict competition in the waste collection market to assure that its decision to procure waste disposal services would be given effect.

Clarkstown's efforts, including both the contract and its waste flow control ordinance, are typical of the measures employed by local governments throughout the nation and throughout the nation's history to provide waste disposal services to their residents.

---

3. Section 3 of the Clarkstown Law provides, in part:

> C. All acceptable waste generated within the territorial limits of the Town of Clarkstown is to be transported and delivered to the Town of Clarkstown solid waste facility . . . or to such other disposal or recycling facilities operated by the Town of Clarkstown, or to recycling centers established by special permit . . . .
>
> D. It shall be unlawful to dispose of any acceptable waste generated or collected within the Town at any location other than its facilities or sites set forth in Paragraph "C" above.

Town of Clarkstown, N.Y., 1990 Local Laws, No. 9, § 3.C. & D.

B. The Economic Forces Underlying the Creation of the Waste Disposal Services Market.

Since the colonial era, one of the principal functions of both states and municipalities has been the protection of public health and safety through interrelated regulation of waste handling and disposal and provision of waste collection and disposal services. State and local government regulation and action has largely created and shaped the market for disposal services which Petitioners invoke in support of their Commerce Clause claims. The need for such government regulation and the provision of such public services is created by economic forces directly relevant to the issues in this appeal.

The public health problems caused by accumulations of trash and rubbish are examples of "externalities." The failure of one individual properly to dispose of waste adversely affects the entire community, not just the individual. *See* Diane Buxbaum & Daniel Baumol, *Service Arrangements for Conventional Disposal, in Evaluating the Organization of Service Delivery: Solid Waste Collection and Disposal*, 421, 450 (E. S. Savas and Barbara J. Stevens eds., 1977) (hereinafter *Savas and Stevens*). Conversely, if most individuals dispose of waste improperly, one individual cannot obtain much personal benefit by his or her own proper disposal. Because individual citizens cannot obtain personal benefits or protect themselves from the acts of others by their own actions, their incentives to purchase waste collection and disposal services are limited. It follows that citizens and private collectors will generally be unwilling to pay private disposal contractors for the public health benefits of environmentally sound disposal if less expensive disposal services are available. Disposal contractors, in turn, will be tempted to maximize profits by spending as little as possible on disposal while charging what the market will bear.

Federal and state regulations requiring minimum standards for disposal facilities are an attempt to force disposal contractors to internalize these externalities under threat of penalties or closure. Regulations, however, can only assure that minimum standards are met and do so only at a high cost of enforcement. Frequently "grandfather clauses" in regulations allow less environmentally sound facilities to continue in operation. Moreover,

regulations in some states and localities are much less stringent than those in others. Local jurisdictions are free to provide disposal services with a level of health and environmental protection higher than that required by regulation and to require their citizens to pay the cost by a variety of mechanisms. Waste flow control legislation is one such mechanism.

When a local jurisdiction acts to provide waste disposal services, it provides a "public good." The health and environmental benefit of proper disposal of the majority of waste accrues to each individual whether or not that individual participates. This creates a "free rider" problem, where some individuals fail to participate, assuming that others' actions will provide them with the same benefits. *See* Franklin R. Edwards and Barbara J. Stevens, *Local Government Regulation of Residential Refuse Collection by Private Firms, in Savas and Stevens, supra.* The only way to assure collective benefits is to require participation by all.

Provision of public services may also require coercion to avoid "cream skimming." It may be profitable for private parties to provide disposal services to some customers, for example, large commercial customers or customers in densely populated or wealthy areas, but not to provide them to others.[4] In order to ensure that services are provided to all, it is often necessary to require participation of all in a single disposal scheme. Because of the economic biases arising in connection with the provision of public goods, the market cannot be relied on to provide appropriate disposal services. The first purpose served by waste flow control legislation is to ensure that waste is disposed of at

4. Many recycling programs suffer because profitable aluminum cans are removed by private scavengers from mixed recyclables set out by homeowners, leaving the local jurisdiction with the remainder of the mixed recyclables, disposal of which is far more costly. Similarly, because markets for recycled goods are commodities markets, private scavengers will typically pick up saleable recycled goods only when there is a positive price and leave the very same goods on the curb for the local jurisdiction to handle when market forces result in a "negative" price. Robert B. McKinstry, Jr., Winifred M. Prendergast and Thomas F. Doyle, *Recycling and Waste Reduction: The Other Half of Municipal Waste Management, in Municipal Solid Waste Disposal Strategies, Environmental Regulation, and Contracts and Financing* (American Law Institute—American Bar Association 1990).

the facility chosen by a local jurisdiction, and that the public health benefits of proper disposal are thus achieved for all on an equal basis.

C. The History of Waste Collection and Disposal Services.

The pattern of state legislation and municipal action which Petitioners challenge began in colonial America. Colonial assemblies frequently authorized cities to provide for removal of refuse. These statutes were initially enacted in response to odors and interference with traffic in the streets. A number of such enactments designated or authorized designation of specific disposal sites, thus beginning the practice of waste flow control in what is now the United States.[5]

Open dumping at specified sites and in oceans and watercourses were the earliest disposal solutions. Much recycling was practiced by scavengers, either directly retained or designated, licensed or permitted by local jurisdictions.

5. Colonial laws enacted by or for the cities of New York (as New Amsterdam), Philadelphia and Charleston all included waste flow control measures allowing local officials to require the disposal of waste in a particular location. The South Carolina legislature in 1764 established a street commission for Charleston, and provided it with the power:

> to contract and agree with any person or persons, to be scavenger or scavengers, to keep the streets, lanes and alleys, and other parts of said town, clean and in good order and repair; *to remove all filth and rubbish, to such proper place or places, in or near the said town, as they shall determine*. . . .

Act of August 10, 1764, *reprinted in* South Carolina Gazette, Aug. 25, 1764 (emphasis added). In 1658, in New Amsterdam, "[t]he burgomasters and schepens ordained that all such refuse be brought to dumping-grounds near the City Hall and the gallows or to other designated places." Maud W. Goodwin, *Dutch and English on the Hudson* 105 (1919); *see also* Christopher Niemczewski, *The History of Solid Waste Management, in Savas and Stevens, supra.* Philadelphia was authorized to implement waste flow controls in 1769. Act of Feb. 18, 1769, ch. DXCIV, 1 Laws of Pa. 284, 287, 297, *reprinted in* the appendix to NABL's Brief (hereinafter "NABL App.") at A-1. It may be reasonably concluded that site designation was a common expedient for dealing with waste accumulations. *See* Ernest S. Griffith, *History of American City Government, the Colonial Period* 99-125, 258-91 (1938) (Da Capo Press 1972).

In the late 1800's, scientific connections were made between disease and improper disposal of wastes, and the technology of waste disposal began to evolve. The first incinerators appeared during this period,[6] as well as competing rendering technologies. These facilities were mostly privately owned and operated under contract to local jurisdictions. *See* Melosi, *Out of Sight, supra,* at 625; William W. Locke and Joseph B. Taylor, *Reports on I. Garbage Disposal in the Outlying Wards, II. History of the Garbage Contract, III. Refuse Disposal of Cities* (1896) (available from Univ. of Chicago Library, Preservation Dept., Negative No. N6958). During the same period, centralized municipal recycling and improved municipal waste collection were introduced in New York. Melosi, *supra*, at 626-29. According to a Department of Interior survey of 199 major cities in 1880, 24 percent of cities directly provided collection service, 19 percent contracted for collection service, 30 percent allowed free competition for disposal services and 25 percent used a combination of practices. Martin V. Melosi, *Pollution and Reform in American Cities, 1870-1930,* 108 (1980).

During the first half of the twentieth century, incinerators and open municipal dumps were the predominant means of disposal. Concerns with sanitation and the introduction of closed packer collection trucks reduced or eliminated much reuse and recycling. A 1977 Columbia University survey found that 66.4 percent of cities surveyed used some form of government procured arrangement (not counting franchises) for waste collection, including 89 percent of cities over 5,000 in population. E. S. Savas, *The Organization of Solid Waste Collection: Findings, in Savas and Stevens, supra*, at 58, 83, 87. In a companion survey, Columbia researchers found that 61 percent of disposal facilities were government owned and another 7.4 percent were government operated even though privately owned. Buxbaum and Baumol, *supra*, at 428. A significant number of these facilities were restricted to use solely by one or more local jurisdictions. *Id.* at 431. While private industry has played a significant role in the waste disposal market, public

6. The first was in Allegheny, Pennsylvania in 1885. Martin V. Melosi, *"Out of Sight, Out of Mind," The Environment and Disposal of Municipal Refuse, 1860-1920* (hereinafter Melosi, *Out of Sight*), 35 Historian 621, 625 (1973).

procurement of collection and disposal services has clearly been and remains the dominant practice.

In the 1970's, the federal Clean Air Act, 42 U.S.C. §§ 7401-7671q (1988), led to the closure of many municipal incinerators. Those that remained in operation had to be equipped with expensive pollution control equipment. RCRA ushered in intense state and federal regulation of hazardous and solid waste disposal practices. RCRA required the elimination of open dumps and their replacement with sanitary landfills. 42 U.S.C. § 6943(a)(2) (1988). RCRA explicitly recognized the central role of states and localities in providing waste disposal services[7] and required states to adopt regional plans for waste disposal. *Id.* § 6949 (1988).

In response to RCRA's requirements, most states adopted comprehensive solid waste legislation requiring local jurisdictions to plan for ecologically sound, long-term waste disposal and granting new or more explicit powers to local jurisdictions to ensure their ability to carry out their plans. Federal and some state regulators have concluded that various types of resource recovery (including recycling) represent the most desirable disposal alternative. *See id.* §§ 6901(b)(7), 6941-41a, 6943(a) (1988); U.S.E.P.A., *The Solid Waste Dilemma: An Agenda for Action, Background Document* 3.B-1 to 3.C-7 (1988); N.Y. Envtl. Conserv. Law § 27-0105 (McKinney Supp. 1993). Both RCRA and many state statutes require the implementation of these and other newer and costlier technologies: cleaner incinerators with energy recovery, composting facilities[8] and mechanized recycling facilities.

These new resource recovery technologies are far more capital intensive than the older generation of municipal dumps, and normally require financing over a long term. H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. I, at 34 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6272. Bond issues ranging from $50 million

7. "[T]he collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies. . . ." 42 U.S.C. § 6901(a)(4) (1988).

8. Composting facilities utilize the organic portion of various waste materials to generate compost which is used as a soil conditioner or potting material. Composting is a form of "resource recovery."

to over $250 million have been required for construction of state-of-the-art waste-to-energy facilities.[9] Costs of modern landfills have also increased dramatically. Construction of a modern landfill requires construction of a leachate collection and treatment system, a synthetic liner, gas control piping, pumps and flares, and groundwater monitoring equipment. *See* 40 C.F.R. pt. 258 (1992); N.J. Admin. Code tit. 7, ch. 26, subch. 2A (1993); 25 Pa. Code ch. 273 (1993).

Although many older incinerators and "open dumps" have been forced to close, many other older facilities that meet certain minimal requirements applicable to existing facilities continue to operate under "grandfather clauses" which exempt them from more stringent requirements applicable to new facilities.[10] These grandfathered facilities are not subject to the same capital and operating costs as new facilities and therefore often have a substantial competitive advantage in price.[11] Thus, the solid waste disposal market has become skewed, conflicting with public policy; although RCRA and state laws favor the construction of state-of-the-art facilities, such facilities may be unable to compete against cheaper, less environmentally sound disposal facilities.

9. By way of example, Lancaster County, Pennsylvania, issued bonds in the amount of $135,600,000 million to finance its solid waste system, while Montgomery County, Maryland, issued bonds in the amount of $325,985,000 to finance its system. NABL App. A-30, A-4.

10. Although in 1984 Congress required upgraded standards for municipal solid waste landfills, Pub. L. No. 98-616, § 302(a)(1), 98 Stat. 3221, 3267 (1984), *codified at* 42 U.S.C. § 6949a(c) (1988), those standards were not promulgated until 1991, 56 Fed. Reg. 50978 (Oct. 9, 1991), *codified at* 40 C.F.R. pt. 258 (1992), and EPA has now proposed to delay the effective date of those regulations. 58 Fed. Reg. 40568 (July 28, 1993). Even when these new standards are in effect, they will apply certain requirements that are critical to environmental protection, such as liners, only to new landfills. *See* 40 C.F.R. § 258.40 (1992). Thus, unlined facilities built before the effective date of the new regulations will continue, perhaps for decades, to provide cheaper, less environmentally sound alternatives to state-of-the-art facilities.

11. The disposal cost at the new county-owned composting facility at issue in *Waste Systems Corp. v. County of Martin* is $72 per ton, while the disposal cost at the appellants' grandfathered landfill is only $30 per ton. 985 F.2d 1381, 1387 (8th Cir. 1993).

Because of competition from these grandfathered facilities, private contractors are generally unwilling to undertake the construction of a new solid waste disposal facility, particularly the statutorily favored resource recovery facilities, unless a minimum amount of income is guaranteed. Waste flow control measures provide this guaranteed level of income in the form of tipping fees for disposal of waste.

D. Institutional Means to Provide and To Finance Waste Disposal Services.

As waste disposal facilities have grown more expensive, development and financing of such facilities has grown more complex. To understand the role played by waste flow control legislation, it is necessary to understand its place in the array of institutional mechanisms for development and financing of solid waste facilities.

Profligate municipal financing of private railroads in the nineteenth century led to imposition of statutory or state constitutional limits on the ability of states and municipalities to incur debt and to lend credit. *See, e.g.*, Stephen M. Lounsberry, *The Scope and Basis of the Local Finance Law*, N.Y. Local Fin. Law at VII (McKinney 1968). In many states these limits also restrict the ability of local jurisdictions to enter into long-term contracts. *See, e.g.*, N.Y. Local Fin. Law § 135-3-a, -b (McKinney 1968). Alternative means of financing projects were therefore developed to avoid exposure of municipal credit. These included the use of separately chartered authorities to construct, own or finance projects and payment for services through enterprise funds kept separate from a jurisdiction's general funds.[12] The use of authorities or enterprise funds,

12. For example, in Oregon, long term contracts can be entered into from an enterprise fund but not directly by a municipality. *See DeFazio v. Washington Public Power Supply System*, 679 P.2d 1316 (Or. 1984). Many jurisdictions cannot enter long term contracts that are not subject to annual appropriations, but authorities chartered in the same jurisdiction frequently can. *Compare* Pa. Stat. Ann. tit. 53, § 306(B)(j) (Purdon 1974) *with id.*, §§ 23308.1, 36901(b), 53202(a), 56802(a), 65802 (Purdon Supp. 1993).

which may have no independent source of revenue, *i.e.*, no taxing authority, led to financing techniques such as rate covenants[13] and put-or-pay contracts.[14]

More recently, in response to the increased capital cost of providing solid waste facilities and RCRA's mandate that states eliminate legal barriers to financing such facilities, 42 U.S.C. § 6943(a)(5) (1988), states have granted local jurisdictions a variety of powers for the specific purpose of providing and financing solid waste services. These include powers to enter into long-term solid waste supply contracts,[15] to enter into put-or-pay solid waste supply contracts,[16] to finance solid waste facilities,[17] to adopt solid waste flow control legislation,[18] to form authorities[19] and to enter into inter-governmental agreements.[20]

Depending on the specifics of local authorization and on technological and political choices, a local jurisdiction may exercise these powers in different ways to assure waste disposal at a facility it has developed or procured. A local jurisdiction may (a) own its disposal site which it may operate itself or

13. A rate covenant is a legally enforceable promise to set rates high enough to pay the costs of a project, including debt service, independent of the level of services provided by the project.

14. A put-or-pay contract is a contract which obligates a local jurisdiction to pay for certain minimum levels of disposal service whether or not those services are actually used.

15. *See, e.g.*, Pa. Stat. Ann. tit. 53, § 4000.304(c) (Purdon Supp. 1993).

16. Power to enter into such contracts without explicit authorization has been called into doubt. *Chemical Bank v. Washington Public Power Supply System*, 666 P.2d 329 (Wash. 1983); *Asson v. City of Burley*, 670 P.2d 839 (Idaho 1983), *cert. denied sub nom. Chemical Bank v. Asson*, 469 U.S. 870 (1984); *Vermont Dept. of Public Service v. Massachusetts Mun. Wholesale Electric Cooperative*, 558 A.2d 215 (Vt. 1988), *cert. denied*, 493 U.S. 872 (1989).

17. *See, e.g.*, Ind. Code Ann. § 36-9-31-4(a) (Burns 1993).

18. *See, e.g.*, 1991 N.Y. Laws ch. 369, § 1, ch. 540, § 1, ch. 569, § 1, & ch. 631, § 1 (identical provisions); Pa. Stat. Ann. tit. 53, § 4000.303(e) (Purdon Supp. 1993).

19. *See, e.g.*, N.Y. Envtl. Conserv. Law § 27-0107 (McKinney Supp. 1993).

20. *See, e.g.*, Conn. Gen. Stat. § 7-339a (1992).

contract for operation by a third party,[21] (b) take waste to a disposal site pursuant to a contract for its use entered into either through a procurement process or by sole source negotiations, (c) franchise an exclusive disposal site,[22] (d) charter an authority by itself to perform such functions, or (e) together with other jurisdictions, charter an authority or enter into intergovernmental agreements to perform such functions. This range of options allows local jurisdictions to use a wide variety of privately provided services for the construction and operation of disposal facilities. There is an active market with many national and international competitors seeking municipalities as customers to provide such services.

When local jurisdictions procure capital intensive facilities, they often use project financing techniques. These techniques allow debt service for the facility to be spread over a long term and shift many project risks to private participants. In a project financing, project debt is repaid with revenues from the project without recourse to the general credit of the project sponsor. This relieves the sponsoring jurisdiction of the risk of general obligation debt[23] and may permit financing in circumstances where state law would not allow general obligation debt to be incurred.[24]

Because project financings rely on project revenue for the repayment of debt, revenue streams from a project must be

21. In some states municipalities are expressly authorized to acquire existing privately owned facilities by condemnation. *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 9-511, 9-516 (1990).

22. A grant of a franchise will be enforced as a contract in the courts. However, unlike a contractor, the franchisee typically collects fees from users of its services, not payments from the local jurisdiction. Cable television franchising is a familiar example. The grant of an exclusive franchise is typically accompanied by rate regulation. *See, e.g.*, N.J. Stat. Ann. § 48:13A-5 (West Supp. 1993).

23. General obligation debt that is secured by the full faith and credit, *i.e.*, the taxing power, of the jurisdiction. General obligation debt is subject to the debt limits discussed above; nonrecourse debt is not.

24. *See* C. Baird Brown and Charles S. Henck, *Structuring Municipal Solid Waste Financing, in Municipal Solid Waste Disposal Strategies, Environmental Regulation, and Contracts and Financing* (American Law Institute – American Bar Association 1992).

secured for the term of the debt. There are two important sources of revenue for waste disposal projects. One source is sales of resources recovered through the disposal process, such as electricity, steam energy, compost or recycled materials. For all currently available technologies, these revenues are insufficient to support a resource recovery facility. Accordingly, the principal source of revenue for any waste disposal project, and the principal source for repayment of debt, is payments for disposal services.[25]

The payments for disposal services for any waste disposal facility are ultimately made by citizens of the local jurisdiction. Where the municipality provides collection and transportation services, citizens may make general tax payments or special payments for waste collection and disposal services and may make them either directly to the local jurisdiction or to an authority with rate setting powers. Where private collection contractors are used, citizens are generally required either to pay a government-fixed rate to a designated contractor (as pursuant to a franchise), or to make individual arrangements with the contractors of their choice. The collection contractors in turn pay tipping fees for waste disposal services at the disposal facility.

Where the local jurisdiction makes arrangements for the provision of disposal services, tipping fees are paid to or for the benefit of the local jurisdiction. If the local jurisdiction or an authority operates the disposal facility, the tipping fees are set by and paid directly to the jurisdiction or authority. Where a local jurisdiction contracts for a private facility to provide disposal services, minimum revenues from tipping fees are generally guaranteed as part of the contract, which also commonly specifies the tipping fee to be charged. Tipping fees at private facilities operating pursuant to a public contract are usually the property of the local jurisdiction and are placed in a special fund to be used by the local jurisdiction to make its

25. There is no interstate market for unprocessed waste. Rather, there are overlapping interstate markets for various solid waste *services*, including waste collection, transportation, storage, treatment and disposal services.

contract payments to the operator.[26] In a few cases, the tipping fees may be paid directly for the operator's account, but regardless of the precise arrangement, the payment of tipping fees directly or indirectly offsets the obligation of the local jurisdiction to pay for services under its contract. Waste flow control legislation enables the local jurisdiction to ensure that the tipping fees paid will be sufficient to satisfy its contractual obligations.[27]

Waste flow control ordinances serve other purposes as well. First, by assuring delivery of waste, such legislation assures that the designated facility receives revenues from the sale of recovered resources, *e.g.*, energy or recycled materials, arising from the processing of waste. These revenues are particularly important to the financing of waste-to-energy and composting facilities and will subsidize tiping fees to a limited degree.[28] Second, waste flow control legislation makes possible the public

26. The fund may also be used to pay for waste management administration or other waste system components such as recycling services. Congress encourages such cross-subsidization. *See* 33 U.S.C. § 1281(e) (1988); 42 U.S.C. § 6948(d)(3) (1988).

27. Petitioners' argument that they should be entitled to compete freely with the Clarkstown Recycling facility to provide waste disposal services is essentially an argument that Clarkstown's power to compel disposal of waste and payment for disposal services must be deployed for its benefit. By analogy, where a local jurisdiction has decided to create a new road, has used its power of eminent domain to condemn a right of way and has selected a contractor to build the road through competitive bidding, a disappointed bidder might argue that it is entitled to force the local jurisdiction to use the power of eminent domain to help it site an alternative road and to help it collect tolls.

28. It would be incorrect to conclude that waste flow control legislation hordes some valuable commodity for the benefit of a local facility and deprives disposal facilities in other states of revenues from recovered resources. Revenues from electricity, steam, compost production, and recyclables do not alone produce positive cash flow for resource recovery facilities; no disposal facility can operate at a profit, even before debt service, without receiving tipping fees. Directing all waste to a designated facility does not have an appreciable effect on commerce, because the recovered resources revenues, by themselves, would not induce any private enterprise to provide disposal services for free. It is only the action of the local jurisdiction to compel payments for *disposal* services that produces a positive cash flow and creates a market for disposal services.

good of proper waste disposal by allowing a jurisdiction to select a more expensive and environmentally superior facility, such as a statutorily-favored resource recovery facility.

E. Related Municipal Services.

The same economic issues that underlie provision of solid waste disposal services underlie provision by local jurisdictions of sewer and water supply services. Local governments generally are authorized by state statute to provide sewage treatment and water supply services to secure public health benefits. They are empowered to *require* participation and payment of service charges by all members of the community served by public facilities or publicly sanctioned private monopolies, even though private services in the form of bottled water, private wells, septic removal and private treatment plants may compete and may be adequate to meet the needs of some. *See, e.g.*, N.J. Stat. Ann. § 40:56-52 (West 1992); *id.* §§ 40A:26A-10 to -14 (West 1993); N.Y. Town Law §§ 198(1)(g)-(k), 201, 202 & 202-a (McKinney 1968); Pa. Stat. Ann. tit. 53, §§ 47043-47064 (Purdon 1966). These mandatory connection and service fees support the financing of the water and sewer systems.[29]

Thus, Petitioners' challenge to exclusive provision of waste disposal services has far wider ramifications than disposal of solid waste. The provision of exclusive sewer and water supply services presents the same policy issues and fact patterns as the provision of waste disposal services, and governmental provision of all such services is called into question. Also called into question is the validity of billions of dollars of financings by local jurisdictions, local and regional authorities and special services districts, the proceeds of which have been used to construct waste disposal facilities, water mains, sanitary sewers, wastewater treatment facilities and sewage sludge disposal facilities.[30]

29. Such fees are mandated where the sewer system has been financed through the Clean Water Act Construction Grants Program. 33 U.S.C. §§ 1281(h)(2), 1284(b) (1988).

30. Wastewater treatment facilities can be integrated with solid waste disposal systems. The Clean Water Act encourages "waste treatment management which results in integrating facilities for sewage treatment and recycling with facilities to treat, dispose of, or utilize other industrial and municipal wastes, including but not limited to solid waste," and mandates that "[s]uch integrated facilities shall be designed and operated to produce revenues in excess of capital and operation and maintenance costs and such revenue shall be used . . . to aid in financing other environmental improvement programs." 33 U.S.C. § 1281(e) (1988).

IV. ARGUMENT

A. Congress Has Authorized State And Local Governments To Impose Waste Flow Controls, Which Are Therefore Not Prohibited By The Dormant Commerce Clause.

The doctrine of the "dormant" Commerce Clause is based on a negative inference arising from the affirmative grant of power to Congress to regulate interstate commerce. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 203 (1824). "Judicial review of state [laws] under the . . . Commerce Clause is intended to ensure that States do not disrupt or burden interstate commerce when Congress' power remains unexercised. . . ." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

Where Congress has exercised its authority to regulate interstate commerce to authorize particular state conduct, the states may engage in such conduct without violating the Commerce Clause. Courts "only engage in this [dormant Commerce Clause] review when Congress has not acted or purported to act. . . . Once Congress acts, courts are not free to review state taxes or other regulations under the dormant Commerce Clause." *Id.* Congress may grant authorization to the states to interfere with interstate commerce either expressly or *impliedly;* in either case, the delegation of authority requires "a clear expression of approval by Congress." *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82, 92 (1984). Congressional consent to state regulation of interstate commerce will be found where Congress has "affirmatively contemplate[d] otherwise invalid state legislation," as evidenced in the statute or legislative history. *Id.* at 91-92. Such affirmative Congressional contemplation of waste flow control is found in RCRA.

As a condition of receiving certain financial assistance, RCRA requires the states to develop and to submit solid waste

management plans to the Administrator of the United States Environmental Protection Agency ("EPA") for EPA's approval. 42 U.S.C. §§ 6946, 6947 (1988). The criteria for approval of these state solid waste management plans include the following "minimum requirements":

> (4) The plan shall provide for the establishment of such State regulatory powers as may be necessary to implement the plan.
>
> (5) The plan shall provide that *no State or local government within the State shall be prohibited under State or local law from negotiating and entering into long-term contracts for the supply of solid waste to resource recovery facilities,* from entering into long-term contracts for the operation of such facilities, or from securing long-term markets for material and energy recovered from such facilities or for conserving materials or energy by reducing the volume of waste.

42 U.S.C. § 6943(a)(4), (5) (1988) (emphasis added).

Thus, in these planning requirements, Congress has required that all states examine their laws applying to state and local governments and assure that no state or local laws prohibit these governments from entering into three kinds of "long-term" relationships: (1) long-term contracts for the supply of solid waste to resource recovery facilities; (2) long-term contracts for the operation of resource recovery facilities; and (3) long-term contracts to secure markets for material and energy recovered by resource recovery facilities. It is "unmistakably clear" that Congress intended that states and local governments have the affirmative power and authority to "regulate interstate commerce" to the extent necessary to achieve these purposes. *See South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. at 91.

The legislative history of section 4003(a)(5) of RCRA, 42 U.S.C. § 6943(a)(5), demonstrates that Congress intended this provision to force states to remove the institutional barriers to the construction and, in particular, the financing of resource recovery facilities:

> [T]o assure the builder of a resource recovery facility that he will have a steady source of garbage and trash in the future, the state plan must provide that no state or local government shall prohibit such local community from entering into long-term contracts to supply discarded materials of the community to resource recovery facilities.
>
> * * *
>
> . . . [M]any cities cannot enter into long-term contracts. Resource recovery facilities cannot be built unless they are guaranteed a supply of discarded material.
>
> * * *
>
> The reasons for this [requirement that state and local laws prohibiting long-term contracts be abolished] are that currently a number of private companies capable of and willing to enter resource recovery ventures if a sufficient volume of refuse can be generated over a sufficiently long period of time *[sic]*. Often municipalities are constrained in their ability to enter long term contracts (5 to 30 years) by their own charters or by state laws. . . . The federal government will not commit technical or financial resources to aid states in the establishment of resource recovery systems if these states maintain barriers to the establishment of such systems.

H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. I, at 7, 10, 34 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6245, 6248, 6272.

Congress understood that resource recovery facilities would not be built unless the financiers of those facilities could be assured of a reliable income stream from waste tipping fees and sales of recovered resources to secure the repayment of the debt incurred to construct the facilities. Congress required in RCRA that state and local governments be able to enter into long-term waste supply contracts in order to secure that reliable income stream. It would be futile to empower a state or local government to enter into such a contract if that governmental unit is constitutionally prohibited from employing means which directly or indirectly require that solid waste generated within that jurisdiction be disposed of at that facility. The authority to direct the flow of solid waste through the adoption of waste flow

control laws is necessary to allow state and local governments to enter into long-term waste supply contacts, and therefore waste flow control laws must be authorized by RCRA.[31] If municipalities are prohibited from adopting waste flow control ordinances, they cannot guarantee to the developers of resource recovery facilities a stable waste stream to provide a stable source of income for the repayment of debt, and resource recovery facilities will not be built.[32]

Congress also expressed the clear understanding that waste flow control legislation was a legitimate and effective means of assuring long-term waste supply already in use at the time RCRA was adopted. Congress expressly acknowledged state authority to adopt waste flow control legislation."

> *This prohibition* [on state or local laws prohibiting long-term contracts] *is not to be construed to affect state planning which may require all discarded materials to be transported to a particular location,* nor should this provision be construed to confer upon local authorities substantive rights that would interfere with the states *[sic]* responsibility for developing and implementing a discarded materials plan.

H.R. Rep. No. 1491, 94th Cong., 2d Sess., pt. I, at 34 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6272 (emphasis added). Congress thus expressed the clear intention not to interfere with then-existing waste flow control legislation.[33] Congress "affirmatively contemplate[d]" that states were and would continue to be authorized to adopt waste flow control legislation, which is nothing more than legislation requiring "all discarded materials to be transported to a particular location."

The Congressional intent to authorize waste flow control by state and local governments was reaffirmed and clarified in the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 94 Stat. 2334 (1980).[34] In order to encourage development of resource recovery facilities and to aid communities in solid waste planning, Congress authorized EPA to assist state and local governments in removing "legal, institutional and economic impediments" to the development of resource conservation and recovery systems, including:

> (B) impediments to the financing of facilities to conserve or recover energy and materials from municipal waste *through the exercise of State and local authority to issue revenue bonds* and the use of State and local credit assistance; and
>
> (C) impediments to institutional arrangements necessary to undertake projects for the conservation or recovery of energy and materials from municipal waste, including the creation of special districts, authorities, or corporations where necessary *having the power to secure the supply of waste of a project,* to conserve resources, to implement the project, and to undertake related activities.

Pub. L. No. 96-482, § 32(f), 94 Stat. at 2355, *codified at* 42 U.S.C. § 6948(d)(3)(B)&(C) (1988) (emphasis added). The reference to "institutional arrangements necessary . . . to secure the supply of waste to a project" makes it clear that Congress contemplated that state plans would use a variety of mechanisms, not necessarily limited to contracts, to secure waste flow. Congress recognized that "various communities throughout the

---

31. The Court of Appeals for the Eighth Circuit has held that RCRA does not authorize the imposition of *waste import restrictions. In re Southeast Arkansas Landfill,* 981 F.2d 372, 377 (8th Cir. 1993). In *Waste Systems Corp. v. County of Martin,* 985 F.2d 1381 (8th Cir. 1993), that court mistakenly held that there is no difference between waste import restrictions and waste flow control laws under RCRA, and followed its earlier holding. 985 F.2d at 1389. RCRA's authorization of long-term waste supply contracts and other institutional arrangements for mandatory waste flow is explicit. The same cannot be said of waste import restrictions.

32. RCRA requires that solid waste management plans provide for "the establishment of such State regulatory powers as may be necessary to implement the plan[s]." 42 U.S.C. § 6943(a)(4).

33. Two years prior to the adoption of RCRA, Wisconsin adopted a statute establishing the Wisconsin Solid Waste Recycling Authority, which was authorized to impose waste flow controls requiring use of the Authority's facilities. 1973 Wisc. Laws ch. 305, § 11.

34. By 1980, Delaware and New Jersey had joined Wisconsin in authorizing or implementing statewide waste flow control. Del. Code Ann. tit. 7, §§ 6403-04, 6406(a)(31) (1991); *A.A. Mastrangelo, Inc. v. Commissioner, Dep't of Envtl. Prot.,* 449 A.2d 516, 521 (N.J. 1982).

nation have different needs and different potentials for conserving resources and for utilizing techniques for the recovery of energy and materials from waste." Pub. L. No. 96-482, § 32(a)(6), 94 Stat. at 2353, *codified at* 42 U.S.C. § 6941a(6) (1988). Some communities will need to utilize waste flow control legislation to satisfy their particular economic or social needs.

RCRA's solid waste management planning requirements are imposed on state and local governments. Congress intended to give those state and local governments *all* of the tools needed to establish rational solid waste management planning mechanisms that would lead to the environmentally sound disposal of solid waste in more costly state-of-the-art facilities. 42 U.S.C. § 6941 (1988). In 1976 and again in 1980, Congress expressly authorized state and local governments to enter into long-term waste supply contracts supported by waste flow control legislation.[35] Accordingly, such legislation, including section 3 of the Clarkstown Law, is not subject to challenge under the dormant Commerce Clause.

---

35. The provisions of RCRA relate to supply of waste to resource recovery facilities and supply of recovered materials. This should not lead the Court to conclude that waste flow control legislation is authorized only to provide a supply of waste for resource recovery facilities. Resource recovery facilities are always built as a part of a larger solid waste system. For example, landfills are *always* needed to receive residue from processing at a resource recovery facility (*e.g.* ash), non-processable waste, and waste generated during certain periods which exceeds the capacity of the resource recovery facility. Therefore, a long term contract for landfill disposal is a necessary part of resource recovery facility financing. Lancaster County, Pennsylvania, has a solid waste management system based on waste flow control which incorporates both a landfill and a waste-to-energy facility. *See* NABL App. at A-47; *see also* NABL App. at A-12. Moreover, as evident from the facts of this case, there is often no clear line indicating whether a solid waste facility is a resource recovery facility. Both facilities here, like many transfer stations, practice resource recovery by removing recyclables. It is for these reasons that Congress required revision of *general* authorization laws to allow states to tailor the requirement to their particular needs rather than passing a preemptive federal law.

B. Waste Flow Control Legislation Should be Upheld Under The *Pike* Balancing Test.

1. Principles of Federalism Favor Upholding State Authority to Impose Waste Flow Control.

The Framers of the Constitution did not intend that the Commerce Clause would displace the basic local governmental power to provide essential services such as waste disposal. A ruling by this Court invalidating the Clarkstown Law would undermine the basis for exclusive public provision of such public health services. Provision of exclusive services to citizens by local jurisdictions necessarily has an impact on commerce, but it is an impact with which the Framers were familiar and which the Framers must have expected to continue.

American colonial cities had the power to provide waste disposal services and to designate disposal sites. In describing the new constitution, James Madison made it clear that these types of services would not be disrupted:

> The powers delegated by the proposed constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite. The former will be exercised principally on external objects as war, peace, negotiation and foreign commerce, with which last the power of taxation will, for the most part, be connected. The powers reserved to the several states will extend to all the objects, which in the ordinary course of affairs, concern the lives, liberties and properties of the people and the internal order, improvement and prosperity of the state.

The Federalist No. 45, at 293 (Madison) (Clinton Rossiter ed., 1961). The dormant Commerce Clause doctrine arises from the silent implication that, in granting Congress the power to regulate commerce, the Framers intended that states not exercise concurrent powers which would interfere with the power of Congress. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) at 203. Clearly, however, the Framers did not imagine that the ordinary and necessary powers of state and local government would be usurped. In *Gibbons*, this Court distinguished between the

power of Congress to regulate commerce and "that immense mass of legislation, which embraces everything within the territory of a state, not surrendered to the general government, [including] health laws of every description." *Id.*

Local jurisdictions provide exclusive waste disposal services to assure public health, because economic analysis and the experience of government has shown that provision of these services is often not safely left to individual incentives. To hold that the dormant Commerce Clause prevents local governments from imposing flow control or otherwise exercising traditional powers to provide exclusive services would turn the structure of the Constitution on its head – making state governments into governments of limited powers and giving the federal government the unlimited and preemptive police power.[36] This was not the Framers' intent.

2. Waste Flow Control Legislation Serves Strong Local Interests Which Outweigh Its Effect on Commerce.

These principles of federalism weigh heavily in favor of upholding waste flow control legislation under the balancing test that this Court has applied to state actions affecting commerce, as set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970):

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with lesser impact on interstate activities.

397 U.S. at 142 (citations omitted).

Petitioners deny that the *Pike* test should be applied, based on the incorrect assertion that a waste flow control ordinance is a discriminatory ban of the type addressed in *Philadelphia v. New Jersey*, 437 U.S. 617 (1977), and *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 112 S. Ct. 2019 (1992). The Clarkstown Law applies to all waste and all citizens over which Clarkstown has any power, without any discrimination whatsoever; if there is any discrimination it is based upon the limits of the local government's powers. Waste flow control legislation is employed by local governments to enable them to provide and to pay for waste disposal services for their citizens and does not prevent others from using those services on the same terms.

Petitioners' claim that the decision to provide services or to purchase from a single source discriminates is an oddly twisted view of the local jurisdiction's action. Where a jurisdiction decides to arrange for disposal services, it may either decide to hire a single contractor (who often comes from out-of-state and may have a disposal facility located out-of-state) or to provide services itself. In either case, this decision necessarily excludes all other competitors who have not been selected to perform those services, wherever located. Private commercial interests are not treated differently on the basis of their location.

Local waste flow control by one jurisdiction is not the same as a statewide import ban. In *Fort Gratiot*, this Court invalidated Michigan legislation banning the disposal of out-of-county waste without the consent of the county in which the disposal facility is located. 112 S. Ct. at 2028. The Court found that this statewide ban requiring affirmative consent of counties was no different from New Jersey's statewide ban requiring consent of the state. *Id.* By contrast, New York's authorizing

---

36. "If a public enterprise undertakes an integral operatio[n] in areas of traditional governmental functions, the Commerce Clause is not directly relevant." *Reeves, Inc. v. Stake*, 447 U.S. 429, 447-54 (1979) (Powell, J., dissenting) (citing *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976)). In several cases, the Court has enunciated a "market participant" doctrine that protects local governments' power to provide services. *See, e.g., Reeves, supra; Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204 (1983); and *United Building and Construction Trades Council v. Camden*, 465 U.S. 208 (1984). By providing waste disposal services for its citizens, local jurisdictions undertake integral operations in the area of traditional governmental functions. Enactment of flow control legislation is part of such integral operations.

legislation,[37] which has not been challenged, does not designate *any* location for disposal, in state or out-of-state, and does not impose any statewide controls.

Accordingly, the balancing test articulated in *Pike* should be applied in this case. Waste flow control legislation in general, and the Clarkstown Law in particular, should be upheld under that test. Waste flow control advances legitimate state and local purposes. Any burden imposed on interstate commerce by such legislation is not "clearly excessive in relation to the putative local benefits." Other means of achieving those purposes do not have a less adverse effect upon the various overlapping interstate waste disposal service markets which are affected.

Waste flow control legislation serves two predominant purposes. First, it serves to assure the public health and environmental benefits by requiring waste disposal in selected facilities which maximize resource recovery, serve all of the people all of the time, and employ greater pollution controls than those meeting the lowest standard for existing facilities imposed in the state with the least stringent regulations. Second, it serves as a mechanism for requiring payments for disposal services by citizens of a jurisdiction.

Petitioners' arguments against flow control do not address this first purpose. Petitioners' argument with respect to the second purpose – that measures to protect the public fisc amount to economic protectionism – is misplaced. The measures that this Court has struck down as economic protectionism have generally been measures to shield local *private* businesses from interstate competition. *See, e.g., Hunt v. Washington*

37. The enabling legislation for Rockland County provides:

> [T]he county of Rockland and all municipalities within the county . . . shall have the power to adopt and amend local laws, ordinances and regulations imposing appropriate and reasonable limitations on competition with respect to collecting, receiving, transporting, delivering, storing, processing or disposing of solid waste or the recovery by any means of any material or energy product or resource therefrom, *including . . . local laws requiring that all solid waste generated, originated or brought within their respective boundaries . . . shall be delivered to a specified solid waste management-resource recovery facility* . . . .

1991 N.Y. Laws ch. 569, § 1.

State Apple Advertising Commission, 432 U.S. 333 (1977). Measures employed to assure that *public* monies are not wasted or *public* credit overextended clearly serve legitimate local public interests.[38]

In serving legitimate local interests, waste flow control legislation does not discriminate in either intention or effect. The local jurisdiction may exercise its power to designate an out-of-state facility as well as an in-state one. Designation of a transfer station, as in the case of the Clarkstown Law or the ordinance at issue in *J. Filiberto Sanitation, Inc. v. New Jersey Department of Environmental Protection*, 857 F.2d 913 (3d Cir. 1988), may, in fact, facilitate ultimate disposal in out-of-state facilities. A local jurisdiction providing disposal services discriminates only in the trivial sense that by choosing to provide one form of disposal it excludes all others, both in-state and out-of-state. Although particular interstate competitors may be displaced, so are all competitors. If this can be viewed as an effect on interstate commerce, it is only an incidental effect of the traditional governmental power to provide exclusive disposal services. More importantly, waste flow control legislation affects in-state and out-of-state interests equally.

Waste flow control legislation also passes muster under the second prong of the *Pike* test, in that its burden on interstate commerce is not clearly excessive in relation to the benefits to be achieved. Both economic analysis and the experience of

38. Petitioners' arguments confuse the concept of simple economic protectionism with that of laws aimed at serving legitimate local economic interests. Promotion of economic interests is a legitimate purpose. In *Pike*, 397 U.S. at 143, this Court recognized that even laws promoting local private economic interests could be legitimate. The fact that the interest promoted is "local" – *viz* restricted to the jurisdiction enacting the law – obviously could not render the purpose "protectionist." All state and local laws must, by necessity, serve interests within the state or locality. The Court has recognized this fact by referring to a "legitimate local interest" in its formulation of the *Pike* test. This Court, in *Maine v. Taylor*, 477 U.S. 133, 148 (1986), described laws promoting economic interests which should be deemed protectionist as those "motivated solely by a desire to protect local industries from out-of-state competition." This Court found that the critical question to be addressed in determining whether a law is discriminatory or protectionist is whether "out-of-state residents were forced to bear the brunt of the conservation program for no apparent reason other than that they lived and voted in other States." *Id.* at 149, n.19.

government teach us that unregulated, private decision-making by waste generators or waste collectors cannot assure sound disposal. Private competition will tend to produce a race for the lowest priced legal means and a strong temptation to the illegal. Moreover, enforcement is far more difficult with neither centralized disposal nor exclusive collection as a check on illegal practices.

Alternative means to achieve the purposes of waste flow control would be more destructive of interstate commerce in the market for waste collection services. This is evident from consideration of the various alternatives whereby a local jurisdiction may ensure delivery to its chosen disposal facility. It may: (a) collect its own waste and deliver it to the disposal facility; (b) contract with haulers to collect waste and require delivery of waste to the facility by contract; (c) franchise haulers on an exclusive or non-exclusive basis to collect waste and require delivery of the waste to the facility as a term of the franchise; or (d) adopt a waste flow control ordinance. Of these alternatives, public collection eliminates private collection entirely. Contracting or the use of an exclusive franchise will reduce the collection market to a single choice and may not be available to some jurisdictions under their authorizing legislation or charters. A system of non-exclusive franchises is functionally equivalent to waste flow control, with an ordinance requiring a franchise, and contractual provisions requiring the use of the designated facility. By contrast,[39] with a waste flow control ordinance, multiple haulers may compete. Many hauler firms operate in interstate commerce and waste generators are free to make whatever contractual relationships they wish with their haulers. Free competition and interstate competition in this market are maintained. Only the location of the disposal facility is mandated – a result that would flow from any of the foregoing alternatives.[39]

---

39. For example, as reflected in its solid waste management plan, NABL App. A-52, Lancaster County, Pennsylvania, had a tradition of providing publicly owned landfill disposal services while relying upon private, unregulated collection and transportation services. When the County decided to replace its outdated landfill with a state-of-the-art resource recovery facility and modern lined landfill, to secure financing the County selected waste flow control legislation in order to disrupt the existing private collection market as little as feasible. NABL App. A-65, A-66; *see also* NABL App. A-42.

In addition, the local jurisdiction may use fees for services or tax revenues that it collects directly to subsidize services or to provide free services at its chosen facility so that collectors, while not legally compelled, are presented with an irresistible market alternative.[40] Petitioners suggest that this is less restrictive, because collectors are not legally compelled to use the jurisdiction's chosen facility. However, although subsidies are different from waste flow control legislation in form, they are not different in substance. A subsidy that is high enough will have the same effect on interstate commerce as waste flow control legislation, but will not protect the public fisc and will discourage recycling and waste minimization.

Building a facility, charging a price that reflects the cost of the facility, and simply hoping that waste will be disposed of there does not represent a real alternative. It does not provide the public good of assuring sound disposal methods,[41] and it improvidently commits a community's resources to provide services that may not be used. A facility in most cases could not be financed on this basis without a commitment of the local jurisdiction's full faith and credit to repayment of the debt. A local jurisdiction, in many cases, would not be empowered to incur general obligation debt for such a speculative endeavor.

Accordingly, even if this Court does not find waste flow control legislation to be authorized by RCRA, waste flow control legislation is consistent with the requirements of the Commerce Clause under the *Pike* test. It achieves legitimate state and local purposes without a disproportionate adverse effect upon interstate commerce.

---

40. This procedure is clearly authorized in some jurisdictions, while in others taxing power may not be available to back up a long-term contract obligation. The power to subsidize waste disposal activities on behalf of in-state residents was upheld by this Court in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976). Montgomery County, Maryland has begun to implement such a system. *See* NABL App. A-18.

41. There is evidence in the record to suggest that Petitioners' facility, unlike Clarkstown's facility, is less than state-of-the-art. Petitioners acknowledge that if their facility were in operation today, it would be subject to more stringent regulations. *See Clarkstown v. C & A Carbone*, 587 N.Y.S.2d 681, 682 (N.Y. App. Div.), *app. denied*, 605 N.E.2d 874 (N.Y. 1992), *cert. granted*, 113 S. Ct. 2411 (1993).

V. CONCLUSION

For the foregoing reasons, this Court should affirm the decisions of the New York courts on two grounds. First, waste flow control is authorized by Congress in RCRA. Second, waste flow control is integral to the exclusive provision of essential governmental services by states and local governments as contemplated by the Constitution, and is constitutional under the test formulated in *Pike* because it serves legitimate purposes without a disproportionate adverse effect upon interstate commerce.

Respectfully submitted,

C. Baird Brown
Counsel of Record
Robert B. McKinstry, Jr.
Brendan K. Collins
BALLARD SPAHR ANDREWS & INGERSOLL
1735 Market Street, 51st Floor
Philadelphia, Pennsylvania 19103-7599
(215) 665-8500

Counsel for Amicus Curiae
National Association of Bond Lawyers

APPENDIX

From Laws of the Commonwealth of Pennsylvania

CHAPTER DXCIV.

An **ACT** *for regulating, pitching, paving and cleansing, the highways, streets, lanes and alleys; and for regulating, making and amending the water courses and common sewers, within the inhabited and settled parts of the city of Philadelphia; for raising of money to defray the expenses thereof; and for other purposes therein mentioned.*

WHEREAS the paving the streets, lanes and alleys, within the inhabited and settled parts of the city of Philadelphia, so far as they have been already paved, and the keeping the same clean, hath greatly contributed to the preservation of the health of the people inhabiting therein, and resorting thither; And whereas the law for effecting these good purposes is near expiring, and divers streets, lanes and alleys, within the said city remain yet unpaved;

* * *

VII. *And be it enacted,* That the said commissioners, or a majority of them, from time to time, shall employ, hire, and agree with proper capable persons to clean, the cart-way of the said streets, lanes and alleys, which have been heretofore, or shall be so paved as aforesaid, and to remove and carry off from thence all mud, dirt and other filth there found, that shall or may incommode the inhabitants, in such manner and form, and at such time or times, as they, the said commissioners, or a majority of them, with the Mayor or Recorder, and any four of the Aldermen aforesaid, shall direct and appoint; which said persons, so agreed with and employed, shall take upon themselves the office and duty of scavengers, pursuant to their respective agreements aforesaid, under the penalty of five pounds for every neglect or refusal; and if any such scavenger shall neglect or refuse to carry off and remove all and every part of the mud, mire, dirt and other filth, found in the streets, lanes and alleys aforesaid, agreeable to his contract with the said commissioners, he shall forfeit and pay any sum, not exceeding twenty shillings for every such offence.

VIII. *And be it further enacted,* That the inhabitants and occupiers of the houses and lots, and the sextons, porters, or

other keepers of churches, meeting-houses, academies, schools, and other public buildings, and burying-grounds, fronting the paved streets, lanes and alleys, within the said city, shall rake and sweep into the cartway the dirt, soil and other filth, to be found on the brick pavement or foot-way before their respective houses, lots or dwellings, or cause the same to be done, once at least in every week; that is to say, on every Friday, when the snow or ice on the said pavements does not prevent, that it may be removed by the said scavengers on the same day, or the day following, under the penalty of any sum, not exceeding five shillings, for every neglect or refusal.

IX. *And be it further enacted,* That no person or persons whatsoever shall cast or lay, or cause to be cast or laid, any shavings, ashes, dung, or other filth or annoyance, on any pavement within the said city, under the penalty of any sum, not exceeding twenty shillings, for every such offence; but every such person and persons, having such shavings, ashes, dung, or other filth, shall keep the same in some other place, until the scavenger shall attend with his cart to carry off the same, which he is hereby enjoined to do once in every week, at least, if required, at the door of every such person, under the penalty of five shillings for every refusal, and to take and receive the same into his cart, and to remove the same out of the inhabited parts of the said city, under the penalty of five shillings for every neglect or refusal; *Provided always, and be it enacted,* That every such person having such mud, dung, ashes or other filth, so to be carried off, shall pay to every scavenger, for all such filth, and no other, as shall be occasioned by or arise from his particular trade, business or occupation, and is not incident to common house-keeping, at such rate as shall be from time to time settled and ascertained by the said commissioners, unless he, she or they shall choose to carry off the same at his, her or their own expense, in another manner.

* * *

XXX. *And be it further enacted,* That if any person or persons shall, after the publication of this act, cast or throw down, out of any cart, waggon or other carriage, any rubbish, dirt or earth, in any public street, lane or alley of the city of Philadelphia, save only in such parts and places as shall be

appointed and agreed on by the said commissioners for pitching and paving the said streets, every such person or persons shall forfeit and pay, for every such offence, the sum of five shillings, and pay the costs of removing the same . . . .

* * *

1 Laws of the Commonwealth of Pennsylvania 284, 287-88, 297.

Excerpts from

OFFICIAL STATEMENT

$325,985,000
NORTHEAST MARYLAND
WASTE DISPOSAL AUTHORITY
SOLID WASTE REVENUE BONDS
(MONTGOMERY COUNTY
RESOURCE RECOVERY PROJECT)
SERIES 1993A

INTRODUCTION

General

This Official Statement, the cover page (excluding prices and yields) and appendices set forth certain information for use in connection with the offering of $325,985,000 aggregate principal amount of Solid Waste Revenue Bonds (Montgomery County Resource Recovery Project), Series 1993A (the "Series 1993A Bonds") of the Northeast Maryland Waste Disposal Authority (the "Authority"). The Series 1993A Bonds are to be issued pursuant to the Northeast Maryland Waste Disposal Authority Act, being Title 3, Subtitle 9, of the Natural Resources Article of the Annotated Code of Maryland (the "Act") and the Indenture of Trust, dated as of March 1, 1993 (the "Indenture"), between the Authority and Signet Trust Company, as Trustee (the "Trustee").

* * *

Purpose of Issue

The proceeds of the Series 1993A Bonds will be used to finance a portion of the costs of the Authority's solid waste disposal project (the "Project"), which includes (a) a mass-burn resource recovery facility to be located in Dickerson, Maryland with a design capacity of 1,800 tons-per-day (the "Facility"), (b) improvements to an existing transfer station (the "Transfer Station") owned by Montgomery County, Maryland, and (c) an

intermodal solid waste transportation system (the "Transportation System") utilizing primarily rail transportation.

The Authority also expects to issue its Solid Waste Revenue Bonds (Montgomery County Resource Recovery Project) Taxable Series 1993B under the Indenture in the aggregate principal amount of $34,660,000 (the "Series 1993B Bonds") simultaneously with the issuance of the Series 1993A Bonds. The proceeds of the Series 1993B Bonds, together with investment earnings, will finance the remaining costs of the Project. The Series 1993B Bonds are not offered by this Official Statement. The Series 1993A Bonds and the Series 1993B Bonds are collectively referred to as the "Series 1993 Bonds." The Series 1993 Bonds together with all additional bonds issued under the Indenture are collectively referred to as the "Bonds." All Bonds will be secured by the pledge of Project Revenues as provided in the Indenture.

In addition to paying the costs of constructing and equipping the Project, the Series 1993 Bond proceeds will be used to fund (1) a Debt Service Reserve Fund for the Series 1993A Bonds in an amount equal to the Debt Service Reserve Fund Requirement for the Series 1993A Bonds, (2) capitalized interest on the Series 1993 Bonds, (3) the repayment to the County and the Authority of previously-expended Project development costs and payment of certain Project development fees and expenses of the County and the Authority, (4) the costs of certain improvements required by the Potomac Electric Power Company ("PEPCO") under the Facility Site Agreement (described herein), and (5) certain costs of issuance of the Series 1993 Bonds. The Series 1993B Bonds are not secured by the Series 1993A Bonds' Debt Service Reserve Fund.

The Project will be owned by the Authority, which will provide certain solid waste disposal services to the solid waste management system (the "County System") of Montgomery County, Maryland (the "County"), pursuant to a long-term agreement between the County and the Authority (the "Waste Disposal Agreement"). Pursuant to a long-term service agreement with the Authority (the "Service Agreement"), the Project will be designed, built and operated by Ogden Martin Systems of Montgomery, Inc. (the "Company"), an indirect subsidiary of

Ogden Corporation. In order to guarantee the Company's obligations under the Service Agreement (including the Company's obligation to make damage payments), Ogden Corporation has entered into a Guaranty Agreement (the "Guaranty Agreement") in favor of the Authority. The Waste Disposal Agreement obligates the County to make monthly service fee payments solely from its Solid Waste Collection and Disposal Fund (the "Solid Waste Enterprise Fund") for solid waste disposal services provided by the Authority sufficient to pay the Authority's net cost of operation of the Project (a component of which is debt service on the Bonds), except that under certain circumstances, all or a portion of these payments need not be made by the County when the Company is required to make damage payments under the Service Agreement; these damage payments are required to be in an amount sufficient to provide for the timely payment of debt service on all (or the applicable portion) of the Bonds. See "Sources of Payment and Security for the Bonds – Sources of Project Revenues."

The County has entered into a Master Authorization containing covenants relating to the financial and operational management of the County System and the Solid Waste Enterprise Fund (the "Master Authorization"). The Waste Disposal Agreement is a Long Term Obligation authorized to be entered into by the County by its Master Authorization which is incorporated in the Waste Disposal Agreement. The County may issue other Long Term Obligations in accordance with its Master Authorization, and Long Term Obligations will be payable pursuant to the Master Authorization on a parity basis with amounts payable by the County to the Authority under the Waste Disposal Agreement. On June 4, 1992 the County issued $34,365,000 of its Solid Waste System Revenue Bond Anticipation Notes Series A and Series B (the "System Bond Anticipation Notes") to finance the cost of a materials recovery facility and certain other capital costs of the County System. The System Bonds Anticipation Notes mature on June 1, 1993. The County expects to refinance the System Bond Anticipation Notes and finance certain other capital costs of the County System by issuing long-term County System revenue bonds (the "1993 System Bonds") in an aggregate principal amount of approximately $51

million in accordance with the requirements of the Master Authorization. The 1993 System Bonds will be Long Term Obligations. The 1993 System Bonds will be issued by the County on or about the date of the issuance by the Authority of the Series 1993 Bonds, but are not offered by this Official Statement.

Project Participants

The Authority. The Authority was established in 1980 to assist participating political subdivisions within the State of Maryland with waste management and the development of solid waste recycling and disposal facilities. The Authority's four original participating subdivisions, the City of Baltimore, Baltimore County, Anne Arundel County and Harford County, were joined in 1987 by the County. The Authority has developed three major solid waste disposal facilities: (1) a 2,250 ton-per-day resource recovery facility in the City of Baltimore, which serves the City of Baltimore and Baltimore County, (2) a 55,500 ton-per-year sewage sludge composting facility in the City of Baltimore, and (3) a 360 ton-per-day resource recovery facility in Harford County. The Authority also assists its members with the implementation of regional recycling programs and has developed State-mandated recycling plans for the City of Baltimore, Baltimore County and Anne Arundel County. For further information about the Authority, see "The Authority."

The County. Montgomery County, Maryland is located adjacent to the nation's capital, Washington, D.C., and consists of 495 square miles of land area and a total population (from the 1990 census) of 757,027. The County is responsible under Maryland law for assuring that adequate facilities exist for the disposal of solid waste generated in the County. Since 1943, the County has provided a County-wide system for the disposal of solid waste and in 1976 established its Solid Waste Enterprise Fund to account for the revenues and expenses of the County System. For further information about the County System, see "County System." According to a 1992 United States Department of Commerce survey, the County ranks eighteenth highest in 1990 per capital income among the 3,106 counties and

county-equivalents covered by such survey. The County government consists of a legislative branch governed by a nine-member elected County Council (the "County Council") and an executive branch headed by an elected County Executive (the "County Executive"). For further information about the County, see Appendix M.

The Company. The Company, a Maryland corporation, was formed in 1989 and is a wholly owned subsidiary of Ogden Martin Systems, Inc. ("Ogden Martin"), a Delaware corporation. Ogden Martin holds the rights to the Martin GmbH für Umwelt- und Energietechnik ("Martin GmbH") technology for solid waste disposal and energy recovery on an exclusive basis in the United States, Mexico, Canada, parts of the Caribbean and Israel. Ogden Martin is a wholly owned subsidiary of Ogden Projects, Inc. ("OPI"), a public company organized under the laws of the State of Delaware. Ogden Corporation currently owns approximately 84.7% of OPI. OPI, through Ogden Martin, is a leading developer of waste-to-energy facilities in the United States. OPI currently has 23 waste-to-energy facilities in operation (seven of which do not use the Martin GmbH technology) and three facilities under construction. Ogden Corporation, a Delaware corporation, is engaged in providing a variety of services through corporate subsidiaries concentrating primarily on waste-to-energy services, the environmental and energy services area, and entertainment and aviation services. For further information about the Company, Ogden Martin, OPI and Ogden Corporation, see Appendix L.

PEPCO. Electricity generated by the Facility will be sold to PEPCO pursuant to the Electricity Sales Agreement. PEPCO, which was incorporated in the District of Columbia in 1896 and in the Commonwealth of Virginia in 1949, is engaged in the generation, transmission, distribution and sale of electric energy in the Washington, D.C. metropolitan area. PEPCO's retail service territory includes the District of Columbia and major portions of Montgomery and Prince George's counties in suburban Maryland. The retail service territory served covers approximately 640 square miles and has a population of approximately 1.9 million. The executive offices of PEPCO are located

at 1900 Pennsylvania Avenue, N.W., Washington, D.C. 20068. For further information about PEPCO, see "PEPCO."

Feasibility Report

The Authority has retained R. W. Beck and Associates ("R. W. Beck") on a non-contingent basis to assess the technical, environmental and economic aspects of the Project and the other components of the County System. R. W. Beck has reported its conclusions with respect thereto in the Independent Consulting Engineer's Report (the "Feasibility Report"), a copy of which is included in this Official Statement as Appendix A. The estimates, opinions and conclusions expressed in the Feasibility Report are based on assumptions and calculations set forth or described therein. The Feasibility Report should be read in its entirety in order to evaluate such assumptions and calculations. Further information about the Feasibility Report is contained under the caption "Feasibility Report."

Project Agreement Obligations

The Series 1993 Bonds and all Additional Bonds issued under the Indenture are limited obligations of the Authority payable solely from the Authority's Project Revenues (hereinafter defined) and certain amounts available under the Indenture, including certain proceeds of the Series 1993 Bonds. The Bonds are not payable from the general funds of the Authority and do not constitute a legal or equitable pledge of, or lien or encumbrance upon, any of the assets or property of the Authority or upon any of its income, receipts or revenues, except as provided in the Indenture. The Bonds do not constitute a debt, liability or pledge of the faith and credit of the State or any political subdivision, including the County. Neither the State nor the Authority nor any political subdivision of the State, including the County, shall be obligated to pay the principal of, or redemption premium, if any, or interest on, or the purchase price of, the Bonds except from the Project Revenues and the other amounts pledged therefor under the Indenture. Neither the faith and credit nor the taxing power of the State or the Authority or any political subdivision of the State, including the

County, is pledged to the payment of the Bonds. The issuance of the Bonds is not directly or indirectly or contingently an obligation, moral or other, of the State, or the Authority or any political subdivision of the State, including the County, to levy any tax or make any appropriation for their payment. There is no provision for appropriations for the benefit of the Authority by the State. The Authority has no taxing power. The Authority has no claim with respect to the Bonds on any revenues or receipts of the State or any agency or political subdivision thereof, except its rights to receive payments from the County pursuant to the Waste Disposal Agreement and its rights arising as an obligee under a Long Term Obligation under the Master Authorization.

The Authority's Project Revenues generally consist of (1) amounts paid by the County from its Solid Waste Enterprise Fund to the Authority for services provided pursuant to the Waste Disposal Agreement, (2) payments by PEPCO to the Authority pursuant to the Electricity Sales Agreement for electricity generated and electrical capacity made available by the Facility, (3) amounts (generally, damage or indemnification payments) which may be paid to the Authority or the Trustee by the Company under the Service Agreement or by Ogden Corporation under the Guaranty Agreement, (4) the Authority's share of the revenues from the sale of Recovered Materials, and (5) certain other receipts of the Authority attributable to the Project, including insurance proceeds and investment earnings on funds (other than the Designated Bonds Fund) held under the Indenture. For a discussion of certain exclusions from Project Revenues, see "Sources of Payment and Security for the Bonds – Project Revenues Defined" and "– Designated Bonds." Under the Waste Disposal Agreement, the Waste Disposal Fee payable by the County is intended to cover the aggregate costs of the Authority with respect to the Project, a component of which is debt service on the Bonds. It includes a credit to the County for PEPCO payments, Recovered Materials revenues received, investment earnings and damage payments made to the Authority pursuant to the Project Agreements. Under the Indenture, the Authority will assign certain of its rights under the Project Agreements to the Trustee for the benefit of the

Bondholders, but will not grant for the benefit of the Bondholders a mortgage on the Project. See "Sources of Payment and Security for the Bonds – Pledge of Project Revenues."

The liability of the County under the Waste Disposal Agreement to pay for services rendered by the Authority to the County thereunder is a limited obligation of the County payable solely from amounts in the Solid Waste Enterprise Fund available for such purposes pursuant to the Master Authorization. This liability does not obligate payment from the general fund of the County and does not constitute or create a legal or equitable pledge of, or lien or encumbrance upon, or claim against, any of the assets or property of the County or of its income, receipts or revenues, except amounts available in the Solid Waste Enterprise Fund pursuant to the Master Authorization. Subject to prior payment of certain operating costs of the County System, the County has provided for the pledge of certain County System revenues (as described below, the "System Revenues") for the payment of certain long term obligations (the "Long Term Obligations"), including the Waste Disposal Agreement. See "Introduction – Solid Waste System – *County System Expenses.*" If the County defaults in its obligation to pay the Waste Disposal Fee, the Indenture precludes the Authority from terminating the Waste Disposal Agreement and requires the Authority to bring appropriate legal actions (including mandamus) to require the County to fulfill its obligations under the Waste Disposal Agreement, including the obligations of the County under the Master Authorization.

* * *

The Authority will make the entire disposal capacity of the Facility available to the County System pursuant to the Waste Disposal Agreement and will sell the entire net electrical output of the Project to PEPCO pursuant to the Electricity Sales Agreement. The ability of the Authority to generate sufficient Project Revenues to pay the expenses of the Project and debt service on the Bonds depends in part upon (i) the ability of the Authority to perform its obligations under the Waste Disposal Agreement and (ii) the ability of the County to generate sufficient System Revenues to make payments from the Solid Waste Enterprise Fund for all System Expenses, including amounts due under the Waste Disposal Agreement.

Solid Waste System

General. Under Maryland law, the County is responsible for the long-term planning of adequate facilities for the disposal of solid waste generated in the County. The County at present provides for the disposal or recycling of solid waste generated in the County through the operation of the County System, an integrated solid waste management system which includes the Transfer Station, the Dickerson Composting Facility (the "Composting Facility"), a materials recovery facility (the "MRF"), a landfill (the "Oaks Landfill") and source reduction and recycling programs. The County System will be expanded to include the Project and a new landfill located near the Facility (the "Site Two Landfill").

Statutory Framework. Chapter 48 of the Montgomery County Code 1984, as amended ("Chapter 48") provides the County's statutory framework for the County System. Chapter 48 governs many aspects of solid waste collection and disposal in the County and includes provisions relating to: the establishment and maintenance of public and private disposal facilities; the establishment of service districts, such as the existing service district in the southern part of the County servicing residences with six or less dwelling units (the "Collection and Disposal District"); the licensing of all waste collectors in the County; the establishment of recycling programs and facilities; and the creation of a solid waste advisory committee. The County has

also enacted a comprehensive zoning and land use regulatory scheme, applicable throughout the County (except for certain municipalities specified in Chapter 59 of the County Code) which limits the zones available in the County for the siting of private solid waste management facilities.

County Ten Year Plan. In accordance with the requirements of Maryland law, the County has adopted a County Comprehensive Solid Waste Management Plan (the "County Ten Year Plan"). The County Ten Year Plan provides for the management of all solid waste generated in the County through the following methods (in order of priority): waste reduction; recycling; incineration of waste that cannot be recycled; and landfilling of waste that cannot be recycled or incinerated. Pursuant to the County Ten Year Plan, the County has designated the Facility as "the central facility" for the disposal of municipal solid waste generated in the County. In addition, the County Ten Year Plan provides for other County System disposal and recycling facilities, including the Site Two Landfill and the MRF. Except for short-term, out-of-County haul arrangements prior to the completion of the Site Two Landfill or another in-County landfill, the County Ten Year Plan makes no provision for the use of out-of-County municipal solid waste disposal facilities. As required by the Maryland Solid Waste Plan Act, the County Ten Year Plan has received all required approvals from the State or has as a matter of law been deemed to be approved. The 1992 amendments to the County Ten Year Plan have been approved by the State.

Solid Waste Enterprise Fund. The Solid Waste Enterprise Fund is an enterprise fund established by County law to account for all revenues and expenditures of the County System. Under County law, the County must maintain and manage the Solid Waste Enterprise Fund so that revenues equal expenses; provided, however, that contributions from the general fund of the County may be (but are not required to be) appropriated by the County Council to fund a portion of the costs or to cover emergency needs, unusual capital expenditures or unplanned deficits not covered by adjustments of collection and disposal fees. No such contribution has been made or been requested to date. Chapter 48 provides that to the extent that annual

expenses exceed or are less than annual revenues, solid waste collection, and disposal charges (described below) shall ordinarily be adjusted at least annually to fund such deficits or to utilize such surpluses. However, retention of surpluses over a multi-year period is permitted when necessary to fund estimated future expenses or to provide funding for future anticipated short term deficits. As of June 30, 1993, the Solid Waste Enterprise Fund is projected to have an available cash balance (unencumbered assets which are available for the timely payment of obligations) of approximately $32 million.

Master Authorization. In order to secure the timely payment of amounts owed under the Waste Disposal Agreement and other Long Term Obligations of the County System, the County has entered into the Master Authorization, which is appended to and incorporated into the Waste Disposal Agreement. The Master Authorization contains various covenants related to financial and operational aspects of the County System. Subject to the provisions of the Master Authorization permitting the application of System Revenues for other System Expenses, the Master Authorization provides for the pledge of all System Revenues to the payment of its Long Term Obligations. Pursuant to the Master Authorization, all revenues of the County attributable to the County System, including Service Charges imposed by the County and Tipping Fees collected by the County at the Transfer Station, are required to be deposited into the Solid Waste Enterprise Fund. All the costs incurred by the County in providing collection and disposal services through the County System are paid from the Solid Waste Enterprise Fund. The Master Authorization includes covenants relating to the establishment of accounts and payment priorities for expenses of the County System; limitations on the ability of the County to enter into certain long term contracts; the maintenance of specified reserves; the prudent operation and maintenance of the County System; the engagement of a consulting engineer to review the status of the County System on an ongoing basis; compliance with laws; and insurance requirements. The Master Authorization covenants are described in

"The County System—Master Authorization Covenants" and "Appendix D—Summary of Certain Provisions of the Master Authorization."

The Master Authorization includes a rate covenant (the "Rate Covenant"), which obligates the County to impose and charge rates, fees and other charges for solid waste services provided by the County System so as to comply with the requirement of Chapter 48 that the Solid Waste Enterprise Fund be maintained so that revenues equal expenses. The Rate Covenant also requires the County to impose Collection Charges sufficient to pay Collection Expenses. Specifically, the Rate Covenant requires the County to fix, charge and collect rates, fees and charges for Disposal Services so as to produce in each Fiscal Year System Revenues which, when combined with balances in certain accounts established under the Master Authorization, will in each Fiscal Year at least equal the sum of (1) 100% of the Operating Expenses of the County System for such Fiscal Year plus (2) 110% of the Long Term Expenses of the County System respecting debt service (which includes debt service on the Bonds) plus 100% of the sum of the balances of amounts payable as Long Term Expenses of the County System for such Fiscal Year plus (3) 100% of the sum of the amounts, if any, required to be deposited in accounts established under the Master authorization for such Fiscal Year.

The Master Authorization contains a service covenant (the "Service Covenant"), which requires the County to operate and maintain sufficient capacity in the County System in accordance with the County Ten Year Plan for the disposal or recycling of all Disposable Refuse generated in the County.

The flow control covenant of the Master Authorization (the "Flow Control Covenant") requires the County to deliver or cause the delivery to the County System of all Disposable Refuse generated (a) from Collection and Disposal District Residences (defined below) and (b) from County facilities. It also obligates the County to use its best efforts (other than by legislation) to deliver or cause the delivery to the County System of substantially all other Disposable Refuse generated within the County. This obligation is subject to the provisions of the County Ten Year Plan that provide for the development of

source reduction programs and commercial recycling programs which may be implemented through private facilities.

In addition, as long as the County meets its Rate Covenant contained in the Master Authorization relating to the generation of System Revenues at minimum levels, the Master Authorization permits the County to provide free or reduced rate disposal service with respect to specific types of solid waste in order to provide incentives for the use of certain components of the County System. If the County is not in compliance with its Rate Covenant, the Master Authorization prohibits the County from providing such service without charging for the cost of the service.

The County has agreed pursuant to the Master Authorization that, to the extent permitted by law, it will not operate, or permit in the County, any waste disposal facilities that will compete with the County System.

County System Revenues. The County deposits all revenues of the County System (the "System Revenues") into the Solid Waste Enterprise Fund. The System Revenues are expected to consist of (1) Service Charges collected by the County for providing solid waste management services through the County System (the "Service Charges"), (2) Tipping Fees paid to the County by private collectors and municipalities utilizing the County System, (3) payments from the County's general fund for services rendered to certain County facilities utilizing the County System ("County Facilities"), (4) revenues from the sale of recyclable materials, yard waste compost and methane gas generated at certain County landfills and fees collected for miscellaneous services and (5) investment earnings on balances in the Solid Waste Enterprise Fund. System Revenues do not include that portion of the service charges imposed on Collection and Disposal District Residences for the collection of disposable waste, as opposed to the collection and processing of recyclable materials or the provision of Disposal Services, even though these service charges are deposited in the Solid Waste Enterprise Fund. County Facilities do not include certain governmental facilities, including public schools and higher education facilities that are not under direct County control. In general, these entities retain private collectors for disposal of

solid waste generated from such facilities. The County Ten Year Plan precludes the acceptance by the County System of solid waste generated outside the County. Accordingly, the Feasibility Report does not assume, and neither the County, the Authority nor the Company expect, that there will be any System Revenues from disposal of such solid waste or electricity revenues generated from the disposal thereof.

Service Charges will consist of either (1) solid waste management service charges ("District Service Charges") collected by the County from residential housing with six or fewer units ("Collection and Disposal District Residences") in the Collection and Disposal District, which is to be expanded to include all of the unincorporated areas of the County or (2) system benefit charges imposed for solid waste management services on all residential and non-residential beneficiaries within a County-wide solid waste management district (the "Systems Benefit Charge").

The Systems Benefit Charge was authorized by Bill No. 42-92 enacted by the County Council on December 8, 1992 (the "Solid Waste Management District Legislation"), which empowered the County to impose the Systems Benefit Charge on residential and non-residential properties located within special service district covering the entire County (the "Solid Waste Management District"). The Systems Benefit Charge may be imposed on all generators of solid waste located in the Solid Waste Management District (or their collectors) to generate funds to provide for all or part of the costs of the County's solid waste management programs regardless of whether the solid waste is delivered to the County System. Although the County is empowered by the Solid Waste Management District Legislation to generate funds to provide for all System Expenses through the Systems Benefit Charge, it expects to continue to establish Tipping Fees and develop other sources of System Revenues.

Sufficient signatures to petition the Solid Waste Management District Legislation to referendum were filed on March 22, 1993. Therefore, the Solid Waste Management District Legislation and the Systems Benefit Charge will be effective only if and when a majority of County voters upholds the

Legislation in an election (anticipated in November, 1994). Neither the County nor the Authority can give any assurance as to the outcome of such an election. In anticipation of such a petition, the County Council adopted an amendment to the County Ten Year Plan to expand the Collection and Disposal District and to empower the Country to impose District Service Charges on Collection and Disposal District Residences in the expanded Collection and Disposal District for solid waste management services made available by the County to Collection and Disposal District Residences. This amendment to the County Ten Year Plan is not subject to referendum. Thus, Service Charges will consist of District Service Charges from July 1, 1993, until such time as, and only if, a majority of County voters upholds the Systems Benefit Charge. Thirty days after any voter approval, (i) the Solid Waste Management District would go into effect, and (ii) the Collection and Disposal District would govern collection arrangements only in the approximately 80,000 households in the existing Collection and Disposal District. The County expects waste collected from Collection and Disposal District Residences in the expanded Collection and Disposal District to be delivered to the County System because the disposal cost will be paid through District Service Charges, and hence no Tipping Fee is payable by the collector for the delivery of this waste to the Transfer Station. Collectors delivering waste from generators other than Collection and Disposal District Residences are required to pay a Tipping Fee or other disposal fee at the Transfer Station. This waste ("Non-District Waste") consists primarily of waste generated by residential facilities with more than six units, commercial, light industrial facilities, certain governmental facilities (other than County Facilities) and certain incorporated municipalities located in the County. The County expects most collectors of Non-District Waste to use the County System because the Tipping Fee will be established for Non-District Waste at a level that is sufficiently competitive with alternate disposal facilities to attract Non-District Waste to the County System.

There have been threats of litigation challenging the validity and certain other aspects of both the Systems Benefit Charge and the District Service Charges. See "Project and Bond

Related Litigation" and the opinions of the County Attorney and Co-Bond Counsel described therein.

Whether Service Charges consist of the Systems Benefit Charge or of District Service Charges, Service Charges imposed by the County on on residential property will be collected with the tax bill for the applicable properties. Pursuant to either method of charging, the County expects that once the Project is operational, Tipping Fees or other disposal fees at the Transfer Station would be established and collected from non-residential collectors and collectors of solid waste from certain incorporated municipalities in the County. The County intends that the Tipping Fee or other disposal fees will be established and collected at a level which is sufficiently competitive to maximize System Revenues and result in the delivery of substantially all of the solid waste generated in the County to the County System in accordance with the County's Flow Control Covenant in the Master Authorization. With the Tipping Fee or other disposal fees so set at a sufficiently competitive rate, the County expects that the balance of the System Revenues would be derived from the Service Charges (i.e., the District Service Charges or Systems Benefit Charge) and to a limited extent from the revenues from the sale of recyclables, yard waste compost, methane gas generated at certain County landfills and investment earnings in the Solid Waste Enterprise Fund.

County System Expenses. Amounts on deposit in the Solid Waste Enterprise Fund may only be used to pay for expenses of the County System, including the Waste Disposal Fee payable under the Waste Disposal Agreement ("System Expenses"). The Waste Disposal Fee is expected to constitute approximately 44% of the projected System Expenses in 1997, the first full year that the Project is expected to be operational. The remainder of the System Expenses is projected to consist of the cost of operating County System collection and recycling programs, of constructing and operating County System landfills, of payment of $9,737,226 (outstanding principal amount as of June 30, 1993) of County general obligation bonds issued to finance certain other County System facilities (as defined below, the "Prior County Bonds"), of the payment of County solid waste system revenue bonds or notes issued pursuant to the

Master Authorization and of services of County employees in connection with the County System. Some System Expenses are payable pursuant to multi-year contracts for the operation of the existing Oaks Landfill and the MRF.

* * *

The Project. The Project will be owned by the Authority and will function as a component of the County System. The Project will consist of (1) the Facility, (2) improvements to the County's existing Transfer Station, and (3) the Transportation System. In the County Ten Year Plan, the County has designated the Project as the central disposal facility for municipal solid waste generated in the County. The Facility will be designed to process 1,800 tons-per-day of solid waste through the use of the Martin GmbH mass-burning technology and to have an annual effective operating capacity of 558,450 tons-per-year assuming the design heat value of the waste. The Facility is designed with a net electricity generating capacity of approximately 48 megawatts. The Facility's air pollution control equipment will include furnace lime injection, acid gas scrubbers, baghouses, nitrogen oxide control equipment and mercury control equipment.

The Transfer Station is located in Derwood, Maryland, in the central portion of the County, approximately 18 miles from the Facility. It is and will remain the primary facility in the County System where solid waste is accepted from collectors. It has been in commercial operation since 1982 as the only facility in the County System where non-recycled solid waste (except for certain County-generated construction debris which is directed to a County System landfill after being weighed at the scales at the Transfer Station) is accepted for disposal. The County will continue to operate the scales at the Transfer Station and to collect Tipping Fees from private collectors delivering waste to the Transfer Station. Transfer Station improvements (the "Transfer Station Improvements") will include the installation of compaction equipment.

The Transportation System includes rail cars and intermodal sealed containers for the transportation of solid waste between the Transfer Station and the Facility. Waste will be

transported from the Transfer Station to the Facility by rail. Residue generated by the processing of waste at the Facility ("Residue"), as well as bypassed Waste and Nonprocessible Waste will be transported by truck from the Facility to the Site Two Landfill. Rail yards will be constructed at the Transfer Station and the Facility. As provided in the County Ten Year Plan, waste will be transported from the Transfer Station to the Facility only by rail.

System Landfills. The County System also includes landfill capacity which will be used for the disposal of Residue and waste that is not processed at the Facility. Since 1982, the County System's primary solid waste disposal facility has been the Oaks Landfill, which is owned by the County and is currently operated by Browning Ferris Industries, Inc. pursuant to a multiyear contract. Pursuant to the County Ten Year Plan, the County will not use the Oaks Landfill as the County's primary disposal facility once it enters into short-term arrangements for the disposal of waste at an out-of-County facility or after the Site Two Landfill or another in-County landfill is operational. The County Ten Year Plan provides that until the Site Two Landfill or another County-owned landfill is completed, the Oaks Landfill shall be maintained in readiness as a backup landfill for unrecycled solid waste (including Residue) if the short-term arrangements are not consummated for any reason or if out-of-County disposal is interrupted (temporarily or permanently) for any reason. The County has also acquired options on a portion of the site, and is in the final phase of the permitting process, for the Site Two Landfill, which, when operational, will have separate monofill capacity for Residue, as well as separate cells for Bypassed Waste and Nonprocessible Waste. The Site Two Landfill is expected to be able to accommodate the disposal of 9.5 million cubic yards of waste and to be available by January 1, 1996. When the Site Two Landfill or any other County-owned landfill opens, the Oaks Landfill will be permanently closed.

Project Agreements

Waste Disposal Agreement. The Authority will use the Project to provide certain solid waste disposal services to the County System under the Waste Disposal Agreement. The Waste Disposal Agreement obligates the Authority to cause the Company to design, construct and operate the Project, which will function as a component of the County System. The County will have the exclusive right to the waste disposal capacity of the Project pursuant to the Waste Disposal Agreement. The Waste Disposal Agreement will be in effect when the Series 1993 Bonds are issued and will remain in effect until the maturity date of all outstanding Bonds or the date on which all outstanding Bonds are defeased, unless the Service Agreement is terminated due to a Company event of default (a "Company Default Termination") and the Company is obligated to pay debt service on all or a portion of the outstanding Bonds as a component of damages. See "Sources of Payment and Security for the Bonds—Debt Service Payable Primarily from Company Damage Payments." The Indenture provides that the Authority shall not terminate the Waste Disposal Agreement in the event of a County event of default under the Waste Disposal Agreement, but shall enforce its rights under the Waste Disposal Agreement. The Waste Disposal Agreement requires the County to pay the Authority monthly installments of the Waste Disposal Fee for the solid waste disposal services provided by the Authority. The Waste Disposal Fee includes amounts in respect of debt service on the Bonds, plus amounts payable by the Authority to the Company under the Service Agreement, plus other Authority costs of operating, maintaining, or administering the Project or of providing services under the Waste Disposal Agreement, less Authority Component Revenues. Authority Component Revenues generally consist of payments by PEPCO in respect of the sale of electricity generated and electrical generating capacity made available by the Facility, the Authority's share of any revenues from the sale of Recovered Materials, investment earnings on funds held under the Indenture and damages paid to the Authority under any Project Agreements, including the Service Agreement. The Waste

Disposal Fee automatically increases to account for any net increases in the cost of providing service, including the portion of cost increases due to the occurrence of Uncontrollable Circumstances not borne by the Company. The County's obligations under the Waste Disposal Agreement are limited to amounts in the Solid Waste Enterprise Fund available for such purposes pursuant to the Master Authorization. See "Sources of Payment and Security for the Bonds—Project Revenues from Waste Disposal Fees." With certain exceptions, the Waste Disposal Agreement does not require payment by the County of the debt service component of the Waste Disposal Fee during the Extension Period or if Facility operations are terminated in connection with a termination of the Service Agreement due to Company default. If the Service Agreement is terminated for Company default and Facility operations are continued, the Company may be responsible for the payment of debt service on a portion of the Bonds and the Waste Disposal Fee will include a debt service component for the remaining Bonds. See "Sources of Payment and Security for the Bonds—Debt Service Payable Primarily from Company Damage Payments" and "—Designated Bonds." Under the Indenture, certain conditions apply to the termination of the Service Agreement by the Authority. The Indenture provides that the Authority may not terminate the Service Agreement and continue operations at the Facility unless, among other things, the Authority engages the services of an acceptable substitute operator of the Facility (a "Qualified Substitute Operator") and unless the County and the Authority enter into an amendment of the Waste Disposal Agreement which provides for continued payment of the Waste Disposal Fee (including the portion of the debt service component not payable by the Company as part of its termination damages) following the termination of the Service Agreement. In addition, the Indenture provides that the Authority may not terminate the Service Agreement due to Company default and abandon operations at the Facility if the Project satisfies the Minimum Performance Standards during a Termination Performance Test and a Qualified Substitute Operator assumes the

Company's obligations under the Service Agreement. See "Appendix C: Summary of Certain Provisions of the Indenture—Exercise of Certain Rights."

Service Agreement. The Authority has entered into a long-term Service Agreement with the Company to serve as a full-service vendor for the Project. All obligations of the Company under the Service Agreement are guaranteed by Ogden Corporation pursuant to its Guaranty Agreement in favor of the Authority. The Service Agreement is in effect for an initial term of 20 years from the acceptance of the Project (or, if later, the date of maturity or prior payment of the Bonds) and provides for two additional 5-year extensions at the option of the Authority.

The Company's agreements under the Service Agreement to design, construct and operate the Project correspond substantially to the Authority's obligations under the Waste Disposal Agreement. Pursuant to the Waste Disposal Agreement, the County recognizes that performance by the Company of these obligations in accordance with the Service Agreement constitutes performance by the Authority under the Waste Disposal Agreement.

The Company must design, build, equip, startup and test the project. The estimated construction price of the Project is approximately $278,000,000. The Company is required to complete the construction and testing of the Project by the Scheduled Acceptance Date, which is 1,011 days after the Commencement Date. Both the Fixed Construction Price and Scheduled Acceptance Date must be adjusted for certain delays and costs caused by Uncontrollable Circumstances and changes to the Project required by the County or the Authority, and such adjustments do not constitute defaults by the Company under the Service Agreement. See "Appendix G: Summary of Certain Provisions of the Service Agreement—Operation of the Project—Uncontrollable Circumstances."

Beginning on a date in 1993 designated by the County, the Company will operate and maintain the Transfer Station and accept and dispose of at the Designated Landfill all Acceptable Waste delivered to the Transfer Station, subject however to the Company's rights to reject waste, including its right to reject waste in amounts greater than specified in daily, weekly and

annual limits. Pursuant to the County Ten Year Plan, the County may select one or more service providers to provide hauling and out-of-County disposal service for waste generated in the County until the Site Two Landfill or another County-owned landfill is completed. Upon such selection, certain provisions of the Service Agreement will be modified to comport with the terms and conditions of this short-term hauling arrangement. Upon finalization of these short-term hauling arrangements, waste accepted by the Company at the Transfer Station that is not needed for start-up or testing of the Project will be loaded at the Transfer Station and transported to the contracted out-of-County facilities for disposal. The County Ten Year Plan provides that if the out-of-County disposal facilities are not available for any reason during this period, the County will make available capacity at its in-County landfill for disposal of unrecycled solid waste accepted by the Company at the Transfer Station. This may include Residue. See "Appendix G: Summary of Certain Provisions of the Service Agreement—Construction of the Project—Operations of the Transfer Station During the Extension Period."

Upon completion of the construction of the Project, acceptance tests will be performed to determine the ability of the Project to meet specified guarantees, including processing capacity, electrical generation, and environmental compliance. The Performance Standards for waste throughput and electricity production provide that the Facility will be able to process up to 558,450 tons-per-year of solid waste, and generate for sale to PEPCO at least 643 kilowatt hours of electrical energy per ton of waste processed, net of electricity consumption by the Facility, subject in each case to adjustment based upon the heating value of the waste, the operating effects of the mercury control equipment, and the availability of certain minimum quantities of process water. If the Company fails to cause the Project to be accepted at the full Performance Standards by the Scheduled Acceptance Date, an Extension Period of up to one year (subject to further extension as a result of Authority Changes or Uncontrollable Circumstances) may be elected by the Company. During the Extension Period, the Company may elect to have the Facility accepted at standards less than the full Performance

Standards (but no lower than the applicable Minimum Performance Standards). See "Appendix G: Summary of Certain Provisions of the Service Agreement—Construction of the Project—Extension Period" and "—Acceptance of Project at Reduced Performance Standards."

At the Company's request, the Authority and the County Representative may (in their sole discretion) elect to have the Project accepted at a standard lower than the Minimum Performance Standards. If the Project is accepted at a Performance Standard lower than the Minimum Performance Standards (the "Substituted Performance Standards"), then (1) the Acceptance Date will occur and (2) at the sole election of the Authority, the Company must pay either (A) liquidated damages to the Authority during the remaining term of the Service Agreement or (B) Reduced Capacity Liquidated Damages. See "Construction and Operation of the Project—Construction—*Extension Period.*" Reduced Capacity Liquidated Damages are required by the Indenture to be applied to an extraordinary redemption of the Bonds. The Authority may terminate the Service Agreement if Performance Tests demonstrate that the Project does not satisfy the Minimum Performance Standards by the end of the Extension Period.

After acceptance of the Project, the Company must operate the Project for a period of 20 years or, if longer, the period ending on the final maturity date of the Bonds. The Company must provide all personnel, supplies and materials for the Project and perform all ordinary and extraordinary maintenance on the Project during the term of the Service Agreement. It will also administer the Electricity Sales Agreement, the Facility Site Agreement and the Rail Transportation Agreement. The Authority will pay the Company a monthly Service Fee consisting of an Operating Charge plus Approved Pass Through Costs and Service Fee Adjustments plus a share of energy revenues less damages payable to the Authority. See "Construction and Operation of the Project—Operation" for a description of certain obligations of the Company and the Authority after acceptance has occurred.

If during any Fiscal Year Acceptable Waste in an amount less than the Guaranteed Throughput Capacity is delivered to

the Facility by or on behalf of the County as a result of increased recycling or a decrease in the amount of Processible Waste generated in the County, then the Company's annual Operating Charge will be reduced. See "Appendix G: Summary of Certain Provisions of the Service Agreement—Changes in Design, Construction or Operation—*Reduced Facility Operating Level.*"

If the Service Agreement is terminated due to Company default, the Company is obligated to pay termination damages to the Authority in an amount at least sufficient to defease all or a portion of the Bonds depending on the throughput capacity of the Project at the time of termination and on whether the Authority and the County intend to continue operations at the Project. If the Authority and the County elect to continue to operate the Project, the Service Agreement obligates the Company to pay as a component of termination damages an amount equal to a portion of the outstanding Bonds determined based upon the shortfall in the throughput capacity of the Facility, if any (as compared to the Guaranteed Throughput Capacity) and such amount is required to be applied to redeem the designated portion of the Bonds (the "Designated Bonds") or, at the Company's election in certain circumstances, to pay principal and interest on such Designated Bonds in accordance with the scheduled payment terms thereof. See "Sources of Payment and Security for the Bonds—Debt Service Payable Primarily from Company Damage Payments" and "–Designated Bonds." For a discussion of the enforceability of the Company's obligations to pay damages, see "Sources of Payment and Security for the Bonds—Limits on Enforceability."

Guaranty Agreement. In the Guaranty Agreement, Ogden Corporation has unconditionally guaranteed the performance by the Company of all of the Company's obligations under the Service Agreement. In order to further secure performance by the Company of its obligations under the Service Agreement, the Authority may require the Company to provide a Guarantor Security Letter of Credit in an amount not to exceed $50 million if (1) requested by the County or (2) Ogden Corporation's senior debt, subordinated debt, or preferred stock does not have a rating in the category of "Baa" or better by Moody's or in the category of "BBB" or better by Standard &

Poor's. See "Sources of Payment and Security for the Bonds—Ogden Corporation Guaranty of Company's Performance." The County may also require delivery of a Guarantor Security Letter of Credit at any time at its option. Neither the Authority nor the County has required delivery of a Guarantor Security Letter of Credit prior to the issuance of the Series 1993 Bonds.

Rail Transportation Agreement. The Authority has entered into a Railroad Transportation Agreement (the "Rail Transportation Agreement") with CSX Transportation, Inc. ("CSX"), which obligates CSX to provide a locomotive and crew and to haul the Authority-owned rail cars and containers between the Transfer Station and the Facility. The Authority must pay CSX for rail haul services based on the tonnages of solid waste and Residue hauled except that a minimum annual payment of $1,500,000 is required. The Company will administer certain provisions of the Rail Transportation Agreement pursuant to the Service Agreement.

Electricity Sales Agreement. The Authority has entered into an Electricity Sales Agreement with PEPCO (the "Electricity Sales Agreement"), which obligates PEPCO to make payments for electricity generated and electrical generating capacity made available by the Facility pursuant to the Electricity Sales Agreement. The prices for energy and capacity delivered under the Electricity Sales Agreement are established by reference to PEPCO's tariff for purchases from cogeneration facilities that is filed with and approved by the Maryland Public Service Commission (the "PSC") from time to time. The tariff reflects PEPCO's avoided cost of producing electricity and capacity. The rates for electricity and capacity may be changed due to a change in PEPCO's future demand for electricity, the future addition of generating units by PEPCO or a change in the operating cost of future generating units in the PEPCO system. See "Appendix H: Summary of Certain provisions of the Electricity Sales Agreement—Purchase and Sale of Electricity." The Facility's electrical generating capacity is established by the Authority and will be tested periodically. The Electricity Sales Agreement imposes damages on the Authority if the Facility falls substantially below the certified capacity level. See "Appendix H: Summary of Certain Provisions of the Electricity Sales

Agreement—Capacity Guarantee." The Company will administer certain provisions of the Electricity Sales Agreement pursuant to the Service Agreement.

Landfill Agreement. The Authority and the County have also entered into a Landfill Agreement (the "Landfill Agreement"), which obligates the County to make available to the Authority landfill capacity for the disposal of Bypassed Waste and Residue for the first five years of Project operations and thereafter to provide such capacity to the extent it is available. The Landfill Agreement is effective as long as any Series 1993 Bonds are outstanding (unless the Service Agreement is terminated due to the fault of the Company and the Project is abandoned, in which case the Landfill Agreement will terminate). During the term of the Waste Disposal Agreement, the County may charge the Authority a Landfill Fee based on the County's actual cost of operating the landfill for waste delivered by or on behalf of the Authority. The Landfill Fee paid by the Authority will in turn be included in the Waste Disposal Fee.

Project Site Lease. The County owns the Project Sites, which include the Transfer Station, the Facility Site, an access road through the Composting Facility and easements granted under the Facility Site Agreement between the Authority and PEPCO (the "Facility Site Agreement"), and has leased them to the Authority under a Project Site Lease for a term of 40 years unless sooner terminated as described in Appendix K.

* * *

Excerpts From

OFFICIAL STATEMENT

$135,600,000
LANCASTER COUNTY
SOLID WASTE MANAGEMENT AUTHORITY
RESOURCE RECOVERY
SYSTEM REVENUE BONDS
SERIES A OF 1988

SUMMARY STATEMENT

The following presents summary information regarding the offering of the Series A Bonds and is qualified in its entirety by reference to the more detailed descriptions appearing in this Official Statement and by reference to the documents described in this Official Statement. No person is authorized to make offers to sell, or solicit offers to buy, the Series A Bonds unless the entire Official Statement is delivered in connection with such offer or solicitation.

Reference should be made to the definitions appearing in Appendices D and G and in the Indenture for the definitions of certain capitalized terms used in this summary and elsewhere in this Official Statement.

Issuer

Lancaster County Solid Waste Management Authority is a body corporate and politic organized and existing under the Municipality Authorities Act of 1945 of the Commonwealth of Pennsylvania. Under the Lancaster County Solid Waste Management Plan 1986 (the "1986 Plan"), the Intermunicipal Agreement and the County Agreement, the Authority has various responsibilities for waste disposal in Lancaster County. The Authority has no taxing power.

Bonds

The Authority is offering $135,600,000 of its Series A Bonds pursuant to this Official Statement. The Series A Bonds are being issued pursuant to a Trust Indenture dated as of June 1,

1988 between the Authority and Fulton Bank, Lancaster, Pennsylvania (the "Trustee"), and between the Authority and Hamilton Bank, Philadelphia, Pennsylvania (the "Co-Trustee"). The Authority intends to issue not in excess of $45,000,000 of Landfill Bonds to finance a portion of the cost of the Landfill Project.

Use of Proceeds

The proceeds of the Series A Bonds will be used to finance a portion of the cost of the acquisition, construction, equipment and installation of a mass burn resource recovery facility and related facilities for the combustion of solid waste and electricity generation (the "Facility"), the Facility Site and related facilities for the transmission of electricity (the "Resource Recovery Project"). The proceeds of the Series A Bonds will also be used to pay capitalized interest on the Series A Bonds during the construction of the Facility, to make a deposit into the Series A Bonds Debt Service Reserve Fund and to pay certain costs of issuance of the Series A Bonds.

Except for the payment of costs of issuance, the proceeds of the Series A Bonds will be held in escrow and will not be disbursed until (1) the governmental permits and approvals necessary for the commencement of construction of the Facility shall have been received, (2) the Pennsylvania Public Utility Commission shall have taken the actions necessary to be taken by it for effectiveness of the Electricity Sales Contract, (3) the Company shall have honored or agreed to honor the Construction Notice to Proceed given by the Authority under the Construction Agreement and (4) the Consulting Engineer shall have given an opinion that there have been no material adverse changes to the conclusions of the Consulting Engineer's Feasibility Report dated June 16, 1988.

Security for the Series A Bonds

The Series A Bonds, the Landfill Bonds and all Additional Bonds issued under the Indenture are and will be secured, as provided in the Indenture, by the pledge thereunder of all of the Authority's right, title and interest in and to the Authority's

Revenues and by all moneys and securities held from time to time in specified Funds and Accounts held by the Trustee (other than the Rebate Fund) under the Indenture. Revenues include, among other things, all Tipping Fees and, after the construction and commencement of operation of the Facility, amounts to be paid by Metropolitan Edison Company under the Electricity Sales Contract. The Revenue Fund, into which the Authority is to deposit all Revenues other than certain proceeds from a Loss Event, is to be held by the Authority unless there is an Event of Default and, unless there is an Event of Default, will not be a trust fund under the Indenture. The Series A Bonds, but not the Landfill Bonds, are secured by amounts in the Series A Bonds Debt Service Reserve Fund.

Under the Indenture, disbursement of moneys from the Revenue Fund shall be under the sole management of the Authority and the Authority is required to disburse money in the Revenue Fund in a particular order so long as no Event of Default has occurred and is continuing. Upon the occurrence of an Event of Default, the Indenture provides that the Authority shall transfer the Revenue Fund to the Trustee and, until such Event of Default is cured, the Revenue Fund shall be maintained by the Trustee and shall be part of the Trust Estate. See Appendix C, "Summary of Indenture" herein.

In addition to the foregoing, the Authority has assigned and pledged to the Trustee, for the benefit of the owners of the Bonds issued under the Indenture, all of its right, title and interest in and to the County Agreement, the County Assignment, the Construction Agreement, the Service Agreement, the Guarantee Agreement and the Electricity Sales Contract, excluding certain reserved rights.

The Indenture includes a rate covenant pursuant to which the Authority covenants to fix, charge and collect, or cause to be fixed, charged and collected, rates, fees and charges for the use of the System and for services provided by the Authority which, together with all other Revenues and all other available funds, will, in each Fiscal Year, be sufficient to provide for payment of expenses of operating, maintaining and repairing the System, administration expenses of the Authority, debt service on all Bonds issued under the Indenture, debt service on all other

debt obligations of the Authority, and amounts required, if any, to be deposited into applicable debt service reserve funds.

The Series A Bonds are special limited obligations of the Authority and are payable solely from and secured by the Trust Estate, which includes, among other things, the Revenues and the Funds pledged therefor under the Indenture. Neither the credit nor the taxing power of the County or of any municipality in the County or of the Commonwealth or of any other political subdivision thereof is pledged for the payment of the Series A Bonds nor shall the Series A Bonds be deemed to be an obligation of any of such entities. The Authority has no taxing power.

Construction and Operation of the Facility

The Facility is to be designed and constructed by the Company pursuant to the Construction Agreement and operated by the Company pursuant to the Service Agreement. The Authority currently expects the Construction Date to occur on or about February 1989. Construction of the Facility is anticipated to be completed in 28 months from the Construction Date. Under the Construction Agreement, the Facility is required to meet certain Performance Guarantees. The Construction Agreement sets forth various consequences if the Facility does not meet the Performance Guarantees. In addition, the Construction Agreement includes various provisions related to Uncontrollable Circumstances and Work Changes.

Under the Service Agreement, the Company is to operate and maintain the Facility for 20 years after the earlier of the Acceptance Date or the date the Facility is placed in service, with the Authority having an option to extend the period for five years (such periods being subject to certain adjustments). The Authority will pay the Company a fee for its services, including a fixed component which is adjusted each year based on an inflation factor and a share of energy and recovered materials revenues. The Service Agreement requires the Company to operate the Facility to continually meet the Performance Guarantees and specifies various consequences if it does not. In

addition, the Service Agreement includes various provisions related to Uncontrollable Circumstances and Work Changes.

See Appendix D, "Information Concerning Agreements Related to the Facility and Parties Thereto" for summaries of the Construction Agreement and the Service Agreement.

Ogden Corporation has guaranteed the obligations of the Company under the Construction Agreement and the Service Agreement. See Appendix D, "Information Concerning Agreements Related to the Facility and Parties Thereto — Guarantee Agreement".

Electricity Sales Contract

The Authority has entered into an Electricity Sales Contract with Metropolitan Edison Company pursuant to which electricity generated by the Facility and not used in the operation of the Facility will be sold to Metropolitan Edison Company. The Electricity Sales Contract has a term of 25 years beginning on the date the Facility commences commercial operation. See Appendix D — "Information Concerning Agreements Related to the Facility and Parties Thereto" for more information regarding the Electricity Sales Contract.

Waste Flow Control

The 1986 Plan was prepared to comply with the requirements of Pennsylvania's Solid Waste Management Act, which is a comprehensive law regulating the management of solid waste disposal throughout Pennsylvania. The 1986 Plan was approved by Lancaster County and all municipalities in Lancaster County and received final approval from the Pennsylvania Department of Environmental Resources on September 30, 1986. In order to implement the 1986 Plan, Lancaster County entered into the Intermunicipal Agreement with each of the municipalities in the County, entered into the County Agreement with the Authority and adopted a Waste Flow Ordinance and each municipality in the County adopted a Municipal Waste Flow Ordinance and entered into the Intermunicipal Agreement. The effect of such agreements and ordinances is to require the delivery to the System of substantially all municipal solid waste generated

within Lancaster County and not source separated or recycled, require licensing by the Authority of all municipal waste collectors and haulers and provide for Authority administration and County enforcement of the ordinances, including Authority establishment of fees for delivery of waste to the System. See "Waste Flow Control" herein.

OFFICIAL STATEMENT

Relating to
$135,600,000
LANCASTER COUNTY SOLID WASTE MANAGEMENT AUTHORITY
Resource Recovery System Revenue Bonds
Series A of 1988

INTRODUCTION

General

The purpose of this Official Statement, which includes the cover page and the Appendices hereto, is to provide information in connection with the issuance and sale by Lancaster County Solid Waste Management Authority (the "Authority"), of its Resourse Recovery System Revenue Bonds, Series A of 1988 in the aggregate principal amount of $135,600,000 (the "Series A Bonds"). The Series A Bonds are being issued to finance a portion of the cost of the Resource Recovery Project.

The Series A Bonds are being issued by the Authority pursuant to a Trust Indenture dated as of June 1, 1988 (the "Indenture") between the Authority and Fulton Bank, Lancaster, Pennsylvania, as trustee (the "Trustee"), and Hamilton Bank, Philadelphia, Pennsylvania, as co-trustee (the "Co-Trustee"), and in accordance with the provisions of the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, as amended and supplemented (the "Act").

The Authority intends to issue not in excess of $45,000,000 of its Resource Recovery System Revenue Bonds, Landfill Series of 1988 (the "Landfill Bonds") to finance a portion of the costs of the Landfill Project.

Certain capitalized terms used in this Official Statement that are not defined elsewhere herein are used with the meanings set forth in Appendix G hereto or in the Indenture.

Purpose of the Financings

The proceeds of the Series A Bonds will be used to finance a portion of the cost to acquire, construct, equip and install a

mass burn resource recovery facility and related facilities for the combustion of solid waste and electricity generation (the "Facility") in Lancaster County, Pennsylvania, the Facility Site and related facilities for the transmission of electricity (the "Resource Recovery Project"). The Facility will be acquired, constructed, equipped and installed pursuant to a Design and Construction Agreement dated as of September 25, 1987, as amended or modified (the "Construction Agreement"), between the Authority and Ogden Martin Systems of Lancaster, Inc. (the "Company"), a Pennsylvania corporation. The Facility will be owned by the Authority. The Company will operate the Facility pursuant to a Service Agreement dated as of September 25, 1987, as amended or modified (the "Service Agreement"), between the Authority and the Company. The Company is a direct wholly-owned subsidiary of Ogden Martin Systems, Inc., a Delaware corporation, which in turn is an indirect wholly-owned subsidiary of Ogden Corporation, a Delaware corporation. The Company was formed in 1987 for general corporate purposes, including designing, constructing and operating the Facility. The obligations of the Company under the Construction Agreement and the Service Agreement are guaranteed by Ogden Corporation.

The proceeds of the Landfill Bonds will be used to pay a portion of the costs of the Landfill Project. The Authority has acquired ownership of a 153 acre parcel of land adjacent to its existing Creswell landfill and intends to develop this parcel of land as an additional landfill. The proceeds of the Landfill Bonds are intended to be used to refinance temporary indebtedness incurred to acquire this parcel and to pay costs for design and engineering of the landfill to be constructed on this parcel, construction and equipment of a leachate treatment system and construction of the first two cells of the landfill.

The Resource Recovery Project and the Landfill Project are integral parts of the Authority's planned overall solid waste management and disposal system (the "System"). In addition to these components, the Authority owns and operates a transfer station, an existing landfill and vehicles, machinery and equipment used in connection with the transfer station, transportation

of solid waste from the transfer station to the existing landfill and disposal of solid waste at the existing landfill.

USE OF PROCEEDS

The proceeds of the sale of the Series A Bonds will be used, together with investment earnings thereon and other funds, to pay a portion of the costs of the Resourse Recovery Project, to fund the Series A Bonds Debt Service Reserve Fund for the Series A Bonds, to fund interest on the Series A Bonds prior to and during the first twenty-five months of the anticipated construction period and to pay certain costs of issuance.

The Authority is an operating entity which, since its formation in December 1954, has provided solid waste disposal services to municipalities and private haulers in the County. The Authority's first landfill began operation on October 3, 1955. This landfill was located in Manheim Township, to the west of Lancaster City, at property owned by the Lancaster Brick Company. In 1955, landfill disposal fees ranged from 30 cents per cubic yard decreasing to 15 cents per cubic yard for persons delivering larger volumes. In 1962, the Authority started landfilling at a site south of Lancaster City. This site is now a part of the Lancaster County Park. In 1964, the Authority acquired land at Creswell, Manor Township, and in 1968 began landfilling at the Creswell site. In order to minimize the effects of the longer hauling distance to the Creswell landfill, the Authority constructed a transfer station in Manheim Township which also has been in operation since 1968. The Authority completed landfilling operations at both the Lancaster Brick Company site and the Lancaster County Park site prior to 1970. Both sites and the Creswell site, along with 61 other sites in the County and 2,117 other sites within the Commonwealth of Pennsylvania, have been included on the Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS"). CERCLIS is a list of sites identified by or referred to the United States Environmental Protection Agency as being worthy of investigation. The Authority cannot predict whether, and to what extent, it may have any liabilities or responsibilities with respect to any of the three sites.

The following information shows how both tipping fees and waste tonnages have increased over the years:

Year	Tipping Fee (per ton disposal charges)	Waste Tonnage (tons)
1980	$ 8.30	270,554
1981	$ 9.00	262,564
1982	$ 9.90	240,836
1983	$10.50	242,944
1984	$11.00	272,354
1985	$12.00 to June 1, then $14.00 to December 31	328,888
1986	$16.00 to June 1, then $19.00 to December 31	396,454
1987	$25.00	405,132
1988	$33.00	–

Prior to January 1, 1988, substantial amounts of solid waste generated in Lancaster County were disposed of at the Lanchester landfill operated by the Chester County Solid Waste Management Authority. During 1987, the Lanchester landfill was utilized for disposal of 242,752 tons of solid waste generated in Lancaster County. The Authority's contract with the Chester County Solid Waste Management Authority, which provided for an $8.00 per ton tipping fee during 1987, expired December 31, 1987; and the solid waste from Lancaster County which was previously disposed of at the Lanchester landfill is now being disposed of at the Creswell landfill. The tipping fees charged by the Authority prior to 1988 reflected the favorable terms under the contract with the Chester County Solid Waste Management Authority and are not representative of fees expected to be charged in the future.

The Authority presently owns and operates (a) a transfer station located at 1299 Harrisburg Pike, Manheim Township, Lancaster County, Pennsylvania, (b) the Creswell landfill located along River Road at Creswell, Manor Township, Lancaster County, Pennsylvania and (c) vehicles, machinery and equipment which are used in connection with the transfer station, transportation of solid waste from the transfer station to the Creswell landfill and disposal of solid waste at the Creswell landfill. The County's solid waste disposal needs are currently provided by landfill disposal at the Creswell landfill and by

unlined sanitary landfills operated by Drumore Township (disposal of approximately 150 tons annually with an estimated remaining useful life of about 2 years) and Colerain Township (disposal of approximately 260 tons annually with an estimated remaining useful life of about 2 years).

In December, 1986, the Authority purchased 153 acres adjacent to its existing landfill. This tract is to be the site of the additional landfill to be financed in part with proceeds of the Landfill Bonds. Also, in December, 1986, the Authority acquired a tract in Conoy Township. A portion of this tract (approximately 56 acres) is intended for use as the site of the Facility.

Audited financial statements of the Authority for the fiscal years 1987 and 1986 and for the period October 1, 1987 to December 31, 1987 are presented in Appendix B hereto. The results of operations of the Authority in future years, and particularly after construction of the Facility, may be significantly different from those represented in these financial statements. The Authority changed from a fiscal year ending September 30 to a fiscal year ending December 31, effective October 1, 1987.

THE COMPANY

The Facility is to be designed and constructed by the Company pursuant to the Construction Agreement and operated by the Company pursuant to the Service Agreement. The Company is a direct wholly-owned subsidiary of Ogden Martin Systems, Inc., a Delaware corporation, which in turn is an indirect wholly-owned subsidiary of Ogden Corporation, a Delaware corporation. Ogden Martin Systems, Inc., through subsidiaries, currently operates five plants located in the United States which are generally similar in design and construction to the Facility.

The Company was formed in 1987 for general corporate purposes, including designing, constructing and operating the

Facility. The obligations of the Company under the Construction Agreement and the Service Agreement have been guaranteed by Ogden Corporation. For additional information concerning the Company, Ogden Martin Systems, Inc. and Ogden Corporation, see Appendix D, "Information Concerning Agreements Related to the Facility and Parties Thereto — The Company, Ogden Martin Systems, Inc. and Ogden Corporation."

* * *

SECURITY FOR THE SERIES A BONDS

The Series A Bonds and the Landfill Bonds (collectively, the "1988 Bonds") and all Additional Bonds issued under the Indenture are and will be secured, as provided in and subject to the limitations of the Indenture, by the pledge thereunder of all of the Authority's right, title and interest in and to the Revenues of the Authority, and by all moneys and securities held from time to time in specified Funds and Accounts (other than the Rebate Fund) established under the Indenture. Under the terms of the Indenture, additional debt can be issued which will be equally and ratably secured as to Revenues with the 1988 Bonds. See "Additional Indebtedness — Other Indebtedness."

In addition to the foregoing, the Authority has assigned and pledged to the Trustee, for the benefit of the owners of the 1988 Bonds, all of its right, title and interest in and to the County Agreement, the County Assignment, the Construction Agreement, the Service Agreement, the Guarantee Agreement and the Electricity Sales Contract, excluding certain reserved rights. Pursuant to such pledge and assignment, the Trustee may require the Authority to carry out such agreements for the benefit of the Bondholders.

The 1988 Bonds are special limited obligations of the Authority and are payable solely from and secured solely by the Trust Estate which includes, among other things, the Revenues and the funds pledged therefor under the Indenture. Neither the credit nor the taxing power of the County or of any municipality in the County or of the Commonwealth or of any other political subdivision thereof is pledged for the payment of

the 1988 Bonds nor shall the 1988 Bonds be deemed to be an obligation of any of such entities. The Authority has no taxing power.

Rate Covenant

In the Indenture, the Authority covenants to fix, charge and collect, or cause to be fixed, charged and collected, rates, fees and charges, for the use of the System and for services provided by the Authority which, together with all other Revenues of the Authority and all other available funds, will, in each Fiscal Year, be sufficient to provide for payment of expenses of operating, maintaining and repairing the System, administration expenses of the Authority, debt service on all Bonds issued under the Indenture, including the Series A Bonds, debt service on all other debt obligations of the Authority, amounts required, if any, to be deposited into any applicable debt service reserve fund in such Fiscal Year and amounts necessary to pay any other obligations of the Authority. This covenant is not qualified or limited under the Indenture.

WASTE FLOW CONTROL

In 1980, Pennsylvania adopted the Solid Waste Management Act (the "Solid Waste Management Act"). The Solid Waste Management Act is a comprehensive law regulating the management of solid waste disposal throughout Pennsylvania. The Solid Waste Management Act requires each municipality of the Commonwealth with a population density of at least 300 people per square mile to adopt a solid waste management plan and to periodically update existing solid waste management plans.

The 1986 Plan was prepared in accordance with the requirements of the Solid Waste Management Act. The 1986 Plan was intended to provide guidance for the implementation of new or expanded transfer, processing and disposal facilities and for the establishment of an overall solid waste management system within Lancaster County. All of the municipalities in Lancaster County have approved the 1986 Plan and agreed to delegate their solid waste management responsibilities to Lancaster County or the Authority. The Pennsylvania Department of

Environmental Resources granted final approval of the 1986 Plan on September 30, 1987.

In order to implement the 1986 Plan, Lancaster County entered into the Intermunicipal Agreement with each of the municipalities in the County and the County Agreement with the Authority. The County also adopted a Waste Flow Ordinance and each municipality in the County adopted a Municipal Waste Flow Ordinance. The effect of such agreements and ordinances is to (i) require the delivery to the System of substantially all Regulated Municipal Waste generated within Lancaster County and not source separated or recycled; (ii) require licensing of all municipal waste collectors and haulers; and (iii) provide for Authority administration and County enforcement of the ordinances.

Intermunicipal Agreement

The Intermunicipal Agreement includes, among other provisions, the following:

(a) During the term of the Intermunicipal Agreement, each Participating Municipality and the County shall deliver or cause to be delivered all Regulated Municipal Waste to the System:

(b) Each Participating Municipality agrees to adopt a Waste Flow Ordinance (and each has done so) which forbids the collection or transportation of Regulated Municipal Waste generated or present within that Participating Municipality by any person who is not duly licensed by the Authority to deliver waste to the System.

(c) The County is to provide in the County Agreement that the Authority shall establish a schedule of fees for delivery of waste to the System, which fees shall be calculated on the basis of the Authority's operating costs, administrative costs and capital costs, including an amount sufficient to cover debt service, depreciation and reserves.

(d) The Authority shall be responsible for collecting all fees for the use of the System from each person delivering solid waste to the System.

(e) Any party may terminate the Intermunicipal Agreement at any time if the System should become unable to accept all Regulated Municipal Waste generated within the County and the Participating Municipalities. Unless so terminated, the Intermunicipal Agreement has a term of 40 years from its effective date in January 1987.

The County has assigned certain of its rights under the Intermunicipal Agreement to the Authority pursuant to the County Assignment.

County Agreement

The County Agreement includes, among other provisions, the following:

(a) During the term of the County Agreement, the County shall deliver or cause to be delivered to the System all Regulated Municipal Waste that is collected by or on behalf of the County or a Participating Municipality.

(b) The Authority shall construct and operate or arrange for the construction and operation of a facility for processing or other disposition of all Regulated Municipal Waste generated within the County and shall determine the means for obtaining financing therefor.

(c) The Authority shall establish the schedule of fees for delivery of waste to the System, which fees shall be calculated on the basis of the Authority's operating costs, administrative costs and capital costs, including an amount sufficient to cover debt service, depreciation and reserves. Consistent with the provisions of the County Agreement, the County has, in the County Waste Flow Ordinance, forbidden the collection or transportation of Regulated Municipal Waste generated or present within the County by any person who is not duly licensed by the Authority to deliver waste to the System.

(d) The Authority shall be responsible for collecting all fees for the use of the System from each person delivering solid waste to the System.

(e) The Authority shall accept all Regulated Municipal Waste generated within the County and the Participating Municipalities at the System for processing, disposal or disposition for a fee for the use of the System.

(f) The Authority shall administer and the County shall enforce the County Waste Flow Ordinance and the Waste Flow Ordinances of the Participating Municipalities, and rules and regulations promulgated thereunder.

(g) The Authority shall coordinate and administer a recycling program on behalf of the County and the Participating Municipalities.

(h) The County shall not consent to the amendment of a Waste Flow Ordinance enacted by a Participating Municipality without the Authority's consent.

(i) Either party may terminate the County Agreement at any time if the System should become unable to accept all Regulated Municipal Waste generated within the County and the Participating Municipalities. Unless so terminated, the County Agreement has a term of 40 years from its effective date in January 1987.

Waste Disposal Fees

Under the terms of the Intermunicipal Agreement and the County Agreement, the Authority is to establish the tipping fees to be collected from each person delivering waste to the System. Such tipping fees are to be calculated on the basis of the Authority's operating costs, administrative costs and capital costs, including an amount sufficient to cover debt service, depreciation and reserves. The Indenture includes a rate covenant of the Authority which requires the Authority to similarly fix and collect its rates, fees and charges. Under the terms of the Intermunicipal Agreement, the tipping fee is required to be uniform at each place of delivery into the System for all waste generated within Participating Municipalities. See "Security for the Series A Bonds — Rate Covenant".

In *Ridley Arms, Inc. v. Township of Ridley,* 522 A.2d 1069 (Pa. 1987), the Pennsylvania Supreme Court decided that the

fees collected from an apartment complex for refuse collection as part of the township's annual tax were unreasonable in violation of a statute authorizing the township to establish charges for such services. In this case the charges paid by the taxpayer were more than twice those imposed for collection service by a private hauler and were required to be paid although the taxpayer made no use of the township collection service and instead relied entirely on the collection service of a private hauler; the private hauler's service was performed three times a week, as compared with the township's twice weekly service; and the private hauler provided large-capacity dumpsters to the taxpayer free of charge, as compared with the township's service requiring the taxpayer to purchase and furnish its own dumpsters of lesser capacity. The Pennsylvania Supreme Court held all segments of the township's refuse collection ordinance which imposed any fees, taxes or charges void as applied to the taxpayer in that case.

The Consulting Engineer has concluded that the fees and charges which it has projected to be collected for delivery of waste to the System, for the Base Case and sensitivity cases it has examined, are reasonable with respect to the lawful disposal of Regulated Municipal Waste in Southeastern Pennsylvania. See Appendix A, "Consulting Engineer's Feasibility Report".

REGULATION

The Authority is subject to regulation by various federal, state and local governmental agencies with respect to the conduct of its activities, including (without limitation) its receipt and disposal of municipal waste and the design, construction and operation of its facilities. Such agencies periodically have revised their regulations and procedures in a manner which has had an impact upon the Authority, and the Authority anticipates that such will continue to be the case.

The General Assembly of the Commonwealth of Pennsylvania is currently considering Senate Bill 528, which proposed legislation would further regulate the manner in which Pennsylvania municipalities and other public agencies (such as the Authority) collect and dispose of solid waste. The proposed legislation, in different versions, has been approved by both the

Pennsylvania Senate and House of Representatives. Adoption of Senate Bill 528, in either the form approved by the Senate or the House of Representatives, could have an adverse effect on the Authority's activities, specifically including the construction and operation of the Facility and the fees that would be charged for its disposal of Municipal Solid Waste. The Authority cannot predict whether Senate Bill 528 will become law or, if it becomes law, the final form of such legislation.

THE SYSTEM

The overall solid waste management and disposal system of the Authority, including, without limitation, all equipment, real and personal property, transfer stations and landfill facilities (the "System") is the primary system for disposal of Regulated Municipal Waste in the County. The Facility, if built, and the additional landfill, the initial development of which the Authority intends to finance in part with the proceeds of the Landfill Bonds, will be integral parts of the System. The Resource Recovery Project, including the Facility and related facilities for the transmission of electricity, and the Landfill Project are being undertaken as part of the 1986 Plan, which was prepared in accordance with the requirements of the Solid Waste Management Act. The 1986 Plan advocates a balanced approach to solid waste management in Lancaster County, including recycling, the recovery of energy from the burnable portion of the non-recycled solid waste and the landfilling of the remainder.

The Series A Bonds are being issued to pay a portion of the costs associated with the Resource Recovery Project, including the Facility and related facilities for the transmission of electricity. The Facility is to be designed and constructed by the Company pursuant to the Construction Agreement and operated by or on behalf of the Company pursuant to the Service Agreement. See Appendix D, "Information Concerning Agreements Related to the Facility and Parties Thereto" for summaries of the Construction Agreement and the Service Agreement. In addition, the Consulting Engineer's Feasibility Report, included as Appendix A hereto, includes a more detailed description of the Facility and additional information regarding the

waste quantities and other aspects related to the Resource Recovery Project and the Landfill Project.

The Facility

The Facility is to be designed to receive and combust, in an economic and environmentally sound manner, 1200 tons per day of Acceptable Waste generated by residential, commercial and industrial sources in Lancaster County. The Facility will use the Martin GmbH proprietary mass burn technology which has been utilized in approximately 115 Martin facilities worldwide, including nine facilities in the United States, five of which have been constructed and are operated by Ogden companies.

Electricity generated by the Facility and not used in the operation of the Facility will be sold to Metropolitan Edison Company pursuant to the Electricity Sales Contract.

The Facility is expected to be located on a site of approximately 56 acres owned by the Authority in Conoy Township, about 20 miles west of the City of Lancaster, Pennsylvania. The site is accessible from Route 441.

Construction of the Facility will not commence until all permits needed to commence construction have been obtained. Operation will not commence until all necessary permits have been obtained. See Appendix A, "Consulting Engineer's Feasibility Report" for the current status of the permits required for the construction and operation of the Facility.

See Appendix D, "Information Concerning Agreements Related to the Facility and Parties Thereto" for additional information regarding the Company and Met-Ed and for summaries of certain provisions of the Construction Agreement and the Service Agreement.

Landfill Project

In 1986, the Authority acquired ownership of a 153 acre parcel of land adjacent to its existing landfill. The proceeds of the Landfill Bonds are to be used to refinance temporary indebtedness incurred to acquire this parcel and to pay costs for design and engineering of the landfill, construction and equipment of a leachate treatment system and construction of the first two cells

of the landfill. All permits necessary to commence construction have been obtained. See Appendix A, "Consulting Engineer's Feasibility Report" for information regarding the Landfill Project. Additional cells for landfilling at this parcel will have to be developed in the future to utilize the full capacity of this parcel and the financing for such development will have to be arranged at that time. Based on the assumptions in the Consulting Engineer's Feasibility Report included as Appendix A hereto, it is expected that the total volume of this landfill will be approximately 11 million cubic yards and that, in combination with the Authority's existing landfill, it will have a useful life of approximately 23.5 years if the Facility commences operation as contemplated and approximately 10 years if the Facility is not constructed. At the expiration of the useful life of this landfill, the Authority would be obligated under the Intermunicipal Agreement to secure an alternate disposal site.

TAX MATTERS

In the opinion of Morgan, Lewis & Bockius, Bond Counsel, under existing law, interest on the Series A Bonds is excluded from gross income for federal income tax purposes, except that (a) any Series A Bond will be subject to federal income taxation during any period during which such bond is owned by a "substantial user" of the Facility or the Resource Recovery Project or a "related person" within the meaning of Section 147(a) of the Internal Revenue Code of 1986, as amended (the "Code"), and (b) interest on the Series A Bonds will be considered a tax preference item in calculating the alternative minimum tax imposed by section 55 of the Code on individuals and corporations and the environmental tax imposed by Section 59A of the Code on corporations.

Financial institutions will not be entitled to deduct that portion of the institution's interest expense which is allocable to interest on the Series A Bonds. The deduction otherwise allowable to property and casualty insurance companies for "losses incurred" will be reduced by an amount equal to a portion of the interest on the Series A Bonds received or accrued during any taxable year. Foreign corporations engaged in a trade

or business in the United States will be subject to a "branch profits tax" on the corporation's "dividend equivalent amount" for the taxable year, which will include interest on tax-exempt obligations such as the Series A Bonds. Certain Subchapter S corporations also may be subject to taxes on their "passive investment income", which could include interest on the Series A Bonds. Up to one-half of the Social Security benefits or railroad retirement benefits received by an individual during any taxable year will be included in the gross income of such individual if the individual's "modified adjusted gross income" (which includes interest on tax-exempt obligations such as the Series A Bonds) plus one-half of the Social Security benefits or railroad retirement benefits received by such individual during that taxable year exceeds the "base amount" described in Section 86 of the Code.

In giving the opinion set forth in the first paragraph of this section, Bond Counsel has assumed the accuracy of certain representations made by the Authority and the Company, which Bond Counsel has not independently verified, and compliance by the Authority with covenants set forth in the Tax Certificate and Agreement delivered by the Authority to satisfy certain requirements of the Code that must be satisfied subsequent to the issuance of the Series A Bonds. Attention is called to the fact that interest on the Series A Bonds may become subject to federal income taxation retroactively to the date thereof if such representations are determined to have been inaccurate or if the Authority fails to comply with such covenants.

In the opinion of Bond Counsel, under existing law, the Series A Bonds are exempt from personal property taxes in Pennsylvania, and the interest on the Series A Bonds, and any gain from the sale thereof, are exempt from Pennsylvania personal income, corporate net income and mutual thrift institution net income taxes.

Except as expressly stated in the first, second and fourth paragraphs of this section, Bond Counsel will express no opinion as to any federal or state consequences of the ownership of, receipt of interest on, or disposition of, the Series A Bonds. Holders of the Series A Bonds should consult their tax advisors with respect to such matters and as to the effect, if any, that

holding the Series A Bonds will have on the matters referred to in such paragraphs.

LEGAL MATTERS

Legal matters incident to the authorization, issuance and sale of, and tax exempt status of interest on, the Series A Bonds will be the subject of an approving opinion of Morgan, Lewis & Bockius, Philadelphia, Pennsylvania, Bond Counsel. A copy of the substantial form of such opinion is set forth in Appendix F. Certain legal matters will be passed upon for the Underwriters by their counsel, Wolf, Block, Schorr and Solis-Cohen, Philadelphia, Pennsylvania. Certain legal matters will be passed upon for the Authority by its counsel, Hartman Underhill & Brubaker, Lancaster, Pennsylvania. Certain legal matters will be passed upon for the Company and Ogden Corporation by Ballard, Spahr, Andrews & Ingersoll, Philadelphia, Pennsylvania.

* * *

Excerpts from

LANCASTER COUNTY SOLID WASTE MANAGEMENT PLAN 1986

EXECUTIVE SUMMARY

The Pennsylvania Solid Waste Management Act of 1980 (Act 97) requires that each municipality with a population density of 300 inhabitants per square mile submit to the Pennsylvania Department of Environmental Resources (PADER) an officially adopted Solid Waste Management Plan. The Plan is to provide for the safe and proper storage, collection, transport, processing, and disposal of municipal waste generated within each community. The majority of the municipalities in Lancaster County have agreed to delegate this responsibility to Lancaster County or its assigned authority with the expectation that the Plan would be approved and adopted by each participating municipality.

Lancaster County is currently generating over 800 tons per day (tpd) of municipal solid waste. It is anticipated that by the year 2010 this generation rate will increase to 1,100 tpd. At present, these wastes along with the several tons of industrial residues that are produced on a daily basis are being deposited at several landfill facilities. The largest facilities in the region include the Creswell Landfill which is owned and operated by the Lancaster Area Refuse Authority (LARA) and the Lanchester Landfill near the Lancaster/Chester County border. Because the facilities are quickly reaching capacity and disposal costs are increasing rapidly, a new plan is needed. Consequently, this Plan has been produced for Lancaster County. It examines the technological, management, administrative, financial, and legislative options that are available for managing the solid waste stream, and recommends an optimal system for the storage, collection, transport, processing, and disposal of municipal solid waste.

The Plan first examines the County in terms of geographic characteristics, natural resources, governmental structure, population, economic activity, and land use. Waste generation

figures are then calculated for each sector of the population (residential, commercial, industrial, and institutional) using guidelines from the PADER and comparing these figures to actual waste stream data collected by LARA. Specific waste generation data are found in the tables at the end of Section 3.0.

After discussing the limitations of the existing waste management system in Lancaster County and identifying future needs, the Plan describes the technologies that are available for each component of the waste management system, including options for storage, collection, transfer and transport, processing, and final disposal of the solid waste stream. The technology for each component is then evaluated in terms of cost, reliability, environmental considerations, and overall suitability to the particular circumstances in Lancaster County. The available options for management, administration, and financing of the solid waste system and legislation to implement the system are described and evaluated. As a result of this evaluation, an optimum overall solid waste management system has been developed.

SOLID WASTE SYSTEM

The Plan proposes the construction of a mass burn waterwall processing facility which is capable of handling approximately 1,200 tpd of municipal solid waste. The heat generated by this process will be used to create steam, which in turn will be used to generate electricity. This electricity will be sold to an electric utility company, and the revenues generated by this sale will be used to offset the costs associated with the operation of the system. This facility is expected to be in full operation by 1990.

An additional key feature of the plan is the increased support to and coordination of recycling. The recovery, collection, and sale of newspapers, glass, aluminum, rags, and other recyclable materials, which is already a significant effort by several volunteer organizations in Lancaster County, will be further promoted by a full-time, paid countywide coordinator. In addition, financial support will be provided to increase the number of collection shelters, to furnish materials handling

equipment, and to meet other requirements of the organizations. Furthermore, centralized coordination and support will be provided to the marketing of the recyclable materials to obtain more stable prices through longer-term arrangements with brokers and recycling industries.

The recycling activities will be closely monitored, and if the County goals as recommended by SolWAC of 5-percent recycling by 1990, 10-percent by 1995, and increasing 1 percent per year up to 20 percent are not achieved, a program of mandatory source-separation of recyclable materials will be considered, at least for the high population density areas of the County.

The Plan also envisions the eventual construction of up to three transfer stations. The most suitable location for these stations has been determined to be near the population centers in the northwestern, northeastern, and southern areas of the County. The proposed location of the processing facility is within the central waste shed which encircles Lancaster City.

Finally, the options for disposal of the non-combustible materials, residual ash from the processing facility, and non-hazardous industrial residual wastes in Lancaster County are extremely limited. It has been determined that the landfill method is the most cost-effective alternative. Therefore, the Plan proposes that the Creswell Landfill, because of its location, its ownership by LARA, and its ability to expand, be used as the final disposal site.

It is estimated that the total cost of the waste-to-electricity facility and the transfer stations will be approximately $125 million. Expansion of the Creswell Landfill will cost an additional $20 million. The projected tipping fees plus the revenues resulting from the sale of the electricity are expected to cover the total anticipated capital and operating costs of these facilities.

In order to legally implement the Plan, the County must first gain control of the flow of municipal solid waste. It must encourage municipalities to adopt the Plan and also require that all waste produced in the County is processed through the County's solid waste management system. These requirements will be effected by ordinances and agreements between the

County and the municipalities and between the County and LARA, which will be the administrating agency under this Plan.

MANAGEMENT AND ADMINISTRATION

LARA already has countywide authority for receiving, transferring, processing, and disposing municipal and residual solid wastes. The full responsibility for managing and administering this plan could be given to LARA. However, there are additional functions which need to be carried out, particularly waste flow control and coordination of recycling, which could be better performed by a new entity with the full authority and responsibility for managing solid waste and implementing this plan.

Therefore, it is recommended that LARA's articles of incorporation be amended to form the Lancaster County Solid Waste Authority (LCSWMA) by County legislation and a resolution by LARA's board pursuant to the Municipal Authorities' Act. The LCSWMA would have a 13-member Board, a full-time executive director and staff, a 15-member Citizens Advisory Committee, and four operation divisions. The four divisions would be: (1) Operations – primarily the present LARA organizations – to develop and operate or contract for the operation of, the transfer, processing, and disposal facilities; (2) Licensing and Enforcement – to ensure waste flow control; (3) Recycling – to coordinate and support the countywide effort; and (4) Planning – to monitor the system, evaluate the operations, and plan for future improvements.

LEGISLATIVE REQUIREMENTS

It is recommended that Lancaster County enact legislation required to establish the LCSWMA, as described above. In addition, five further sets of legislation, resolutions, and agreements are required.

Resolution Adopting the Lancaster County Solid Waste Management Plan

Each municipality agreeing to implement the Plan must pass a resolution approving and adopting the County Plan.

Municipal Waste Flow Ordinance

Each municipality agreeing to implement the Plan must pass an ordinance which requires all municipal solid waste collectors to be licensed by the County and to deliver all wastes collected within the municipality to a designated transfer station or disposal facility.

Lancaster County Waste Flow Ordinance

The County must pass an ordinance providing for the licensing of municipal solid waste collectors and requiring disposal of wastes only at designated transfer stations or disposal facilities.

Agreement Between Lancaster County and the LCSWMA

The County must sign an agreement with the LCSWMA establishing the basis for providing municipal solid waste to the LCSWMA transfer station(s) and waste-to-energy facility; and LCSWMA must sign the agreement to accept, process, and dispose of the waste.

The LCSWMA must develop, establish, and publish the regulations for licensing haulers and the conditions for collection, transport and delivery of municipal and residual wastes to the Authority facilities.

Intermunicipal Agreement

The County and each participating municipality must sign an intermunicipal agreement which authorizes the County to adopt a Waste Flow Ordinance and to commit the wastes for delivery to the LCSWMA facilities. In effect, the Intermunicipal Agreement ties together the above resolutions, agreements, and ordinances so that the municipal solid wastes are clearly designated for delivery to, and acceptance by, LCSWMA facilities. Examples of the resolutions, ordinances and agreements are provided in Appendices C through G.

Other Municipal Ordinances

The municipalities retain the responsibility and authority to adopt ordinances controlling the storage, collection, and transportation of municipal solid wastes within their boundaries. Municipalities may enact compulsory source separation and anti-scavenging ordinances to promote recycling.

* * *

7.8 *OVERALL SYSTEM MANAGEMENT, ADMINISTRATION, AND LEGISLATION*

7.8.1 *Institutional Requirements for Management and Administration of the Overall County Solid Waste System*

There are three potential institutional mechanisms upon which Lancaster County could rely to construct and operate the overall County system:

1. The County could own and operate the system itself through a unit of the County government ("county department")

2. The County could rely upon an authority created pursuant to the Municipal Authorities Act, Pa. Stat. Ann. 53, §§ 301-322 (Purdon 1974 and Purdon Supp. 1985)

3. The County could seek to rely upon private entities and the private market to fulfill these needs.

Lancaster County bears a distinct advantage over many other Pennsylvania counties in that an administrative structure which could be used implement a solid waste management plan is already in place. An entity which could be primarily responsible for implementing the most crucial segments of the plan — notably construction, expansion and operation of the solid waste facilities called for by this Plan — has already been created and has been operating for a number of years. That entity, LARA, is already operating a landfill and a transfer station and is accepting waste from much of the County.

Use of LARA, with some modification, to implement the plan, bears a number of distinct advantages over creation of a County department or reliance upon private industry. The facts

that LARA (1) has an established administrative structure and staff (2) owns and operates existing facilities upon which the County will rely (3) owns sites upon which some of the future facilities will be located and has begun to prepare designs and permit applications for those sites, and (4) has an established record of providing solid waste disposal services, militates heavily in favor of relying upon LARA or a successor authority rather than on either a County department or private industry.

Use of an authority is superior to reliance upon private markets for the following:

1. Private industry is not obligated to implement a plan and, thus, one cannot be assured that planned facilities will be built on a predictable schedule.

2. Private industry lacks condemnation power and may be unable to obtain the necessary sites.

3. Public bodies can be more responsive to the wants and needs of County residents than private industry.

4. The law in Pennsylvania expresses a clear preference to public control over solid waste disposal, as expressed in the Pennsylvania Solid Waste Management Plan,[1] state case law,[2] and legislation.[3]

Use of an authority rather than a County department is also favored for the following reasons:

1. The County can be insulated from future liabilities arising from ownership or operation of the facilities.

2. Even more importantly, if the County decided to own and operate the solid waste facilities within the County System, itself, the County would be required to take control of LARA's existing facilities, including its landfill to

1. *Pennsylvania Solid Waste Management Plan,* Appendix E-3 "Statement of Department Attorney Attesting to the Authority of the Department," Answer to Question 3 at pp. E-3.3 to E-3.4 (April 1982).

2. *Kavanagh v. London Grove Township,* 486 Pa 133, 404 A.2d 393 (1979).

3. *See* Pa. Stat. Ann. tit. 53, §§ 5[illegible]7, 65708 (Purdon 1974).

obtain the economics associated with unified control and operation of all necessary facilities. If the County owned or even operated these existing facilities, it would be exposed to potential liability arising from LARA's past operation of those existing facilities. That liability could be very extensive. This reason alone militates against the County taking control.

4. Borrowing the large sums of money necessary to finance construction of needed facilities may impair the County's debt limits.

5. If a County department were used, its budget would be part of the general County budget. In such case, there may be a temptation to divert revenues from tipping fees to meet the general expenses of County government and away from needed environmental improvements. Political pressures could also be exerted to keep tipping fees artificially low, such that measures necessary to protect the environment may be delayed or abandoned and the users will not bear the full control of their waste generation produces.

Accordingly, use of an existing Countywide solid waste authority to implement the "physical" (construction and operation) components of a Plan is the optimal management and administrative program (*See* 25 Pa. Admin. Code § 75.11(i)(13)(ii)). Having an existing implementation agency such as LARA also vastly simplifies the legislative and administrative program necessary fully to implement the proposed plan.

7.8.2 *Additional Functions to be Implemented*

Although an Authority is the optimal administrative unit for constructing and operating the transfer, processing and disposal facilities called for in the Plan, there are a number of other functions relating to solid waste planning and implementation which might still be performed by a County department. However, as discussed below, the optimal program would incorporate as many functions as feasible into a single authority, because that authority would have the greatest solid waste expertise within the County and access to most information. As

discussed below, there are some limitations to this approach, since the powers which may be exercised by an authority are limited both by statute, *see,* e.g., at Pa. Stat. Ann. tit. 53, § 306 and the Pennsylvania Constitution, *see,* e.g., Pa. Const., Art. III, § 31. *Evans v. West Norriton Township Municipal Authority,* 370 Pa. 150, 87 A.2d 474 (1952).

7.8.2.1 *Recycling*

One of the additional functions which must be performed is recycling. As discussed above, the plan calls for the County initially to provide (1) services to coordinate volunteer and municipal efforts, (2) transportation, and (3) market coordination, with later implementation of mandatory recycling ordinances only if necessary. Although a County department could coordinate the recycling activities, there are many reasons for utilizing the same agency for providing these recycling services as provides other solid waste services. For example, a single authority could use the transfer stations called for by the Plan to be operated by the authority for recycling consolidation, processing and transfer. Vehicles and staff could also be used for both tasks, offering considerable efficiencies of scale. Utilizing the same entity would also allow maximum coordination of recycling with disposal.

There is a danger that an authority primalily geared towards waste disposal and mass burning, such as is recommended here, may de-emphasize materials recovery and emphasize energy recovery. However, this danger is minimal, since the initial recommendation of this Plan calls for the authority merely coordinating these activities rather than controlling the volunteer municipal activities. This approach meshes with that proposed in the proposed Pennsylvania Municipal Waste Planning and Resource Recovery Act (SB 1211), which would leave primary responsibility for implementing recycling programs with municipalities, but would allow County planning and coordination. In addition, the Plan calls for limitations in a proposed agreement between the authority and the County which would require the authority to maximize recycling activities.

7.8.2.2 *Planning*

A second function which is currently not performed by LARA is solid waste planning. Although this function could continue to be performed by SolWAC or another unit of County government, it would be preferable to have the implementation authority also responsible for updating and amending the County's solid waste management plan. The authority would have best access to information crucial to planning as well as an existing staff with expertise in solid waste management and knowledge of the particular problems of solid waste management faced by the County and funds to prepare necessary plans. Moreover, making one agency responsible for planning and implementation may avoid some of the conflicts and fragmentation which have appeared during the County's present planning efforts.

Reliance upon an authority to prepare plans and make recommendations with respect to the planning both has the disadvantage of placing that responsibility with a group which is appointed but then insulated from control by elected officials. Nevertheless, the authority, at best, will be authorized to recommend a plan for approval by the County Commissioners, thereby assuring ultimate control by elected officials. Moreover, this Plan is also recommending creation of a solid waste advisory committee, such as is proposed under the Municipal Waste Planning and Resource Recovery Act (SB 1211), to provide advice to LCSWMA and to the County Commissioners with respect to future planning and plan implementation. This group would be cross-representational and would assure public input and public responsiveness. It would be, however, an advisory committee only. All staff and support functions would be provided by LCSWMA. This approach would further the overall goal of allowing all the costs of solid waste disposal to be ultimately borne by waste generators through tipping fees.

7.8.2.3 *Licensing and Enforcement*

A third function, discussed at further length below, is that of creating a licensing system to assure waste flow. While the County or municipality must bear ultimate responsibility for enforcement of a licensing and waste flow ordinance, an authority could most efficiently administer the licensing system. LARA

already administers a dumping license system pursuant to its authority to enact rules and regulations governing use of its facilities and operation of its business. Pa. Stat. Ann. tit. 53, § 315 (Purdon 1974). This authority can allow LARA to limit access to certain categories of users (i.e., licensed collector/haulers and individual generators), dictate access routes to its facilities and direct generators from particular regions to specific facilities. A waste licensing and waste flow ordinance can simply provide that only entities licensed to dump at LARA may collect municipal waste within the County or the municipality, thus utilizing an existing licensing system and its existing administrative capabilities. For this reason, this function would best be performed by the single countywide authority.

Thus, in order to promote efficiency, to protect the County from liability, to preserve the County's ability to raise money in the future and to assure that the true cost of solid waste management is ultimately borne by the users, the optimal means for implementing this Plan is to place the maximal responsibility permitted by the law in an authority.

7.8.3 *The Lancaster County Solid Waste Management Authority*

Because LARA already exists and already owns many of the facilities which will be relied upon, rather than creating a new authority, LARA may be assigned these functions. However, with these new functions, LARA should be modified as authorized by Pa. Stat. Ann. tit. 53, § 305 (Purdon 1974). Among other things, LARA's name should be changed. Lancaster Area Refuse Authority may denote an authority limited in jurisdiction to the area around Lancaster City and use of the word "refuse" may denote concern with disposal of unwanted materials rather than recovery of energy and materials as is contemplated by the present plan. Accordingly, this Plan recommends that LARA's name be amended to Lancaster County Solid Waste Management Authority ("LCSWMA"). LARA's Articles of Incorporation should also be amended to reflect LARA's new planning and recycling functions. In order to do so, LARA must adopt a resolution setting forth the proposed amendments and submit that resolution to the County, which must then adopt the

amendment by resolution or ordinance. Pa. Stat. Ann. tit. 53, § 305 (Purdon 1974).

* * *

7.8.4 *Optimal Financing and Procurement Mechanism*

The legislative program which will be necessary for implementing the Plan is largely determined by the need to secure financing for the principal component of the Plan, the proposed municipal waste incinerator for converting municipal waste into steam and electrical energy ("waste-to-energy facility" or "facility"). The very high capital costs of such a facility can be financed with private equity, general obligation debt instruments issued by the County or the County's municipalities, debt instruments secured by revenues from the Resource Recovery Facility ("Revenue Bond"), or a variety of combinations of the foregoing.

Public financing appears to be preferable to private financing because of (1) the existence of LARA, (2) the County's established tradition of public control over solid waste processing and disposal, and (3) the previously discussed preference for public control over solid waste disposal expressed in the Pennsylvania Solid Waste Management Plan, state case law, and legislation. Issuance of tax free revenue bonds by LCSWMA appears preferable to general obligation bonds because (1) the high costs of construction for a resource recovery facility could impair the County debt limits and (2) the primary implementation agency, LCSWMA, will be an authority which cannot issue general obligation bonds. These revenue bonds can be coupled with opportunities for private equity contributions from a contractor or vendor selected to supply or to operate the Facility.

7.8.4.1 *Procurement and Financing Alternatives*

The Alternatives Report (GBB 1985, pp. 5-1 through 5-25 and Appendix I) discussed the risks involved in various procurement approaches and the advantages and disadvantages of financing alternatives. In particular, the Alternatives Report presented information on the following procurement methods:

1. A/E Procurements (architectural/engineering)
2. Turnkey Procurements
3. Full-Service Procurements

No procurement method was recommended, although the report noted that "Risk for the procuring agency is generally greatest under the A/E approach and least under the full-service approach. However, the least risk may carry a greater financial cost." LARA is currently investigating the procurement methods that are best suited to Lancaster County.

The Alternatives Report noted that "Waste-to-energy projects financed with revenue bonds have had limited acceptance in the financial market, and the issues have been characterized by high yields and high debt service coverage requirements . . . [T]he investment banking industry has sought to enhance project financing . . . through innovative financing techniques . . . In any case, there is still a trend toward project financing which includes some form of tax-exempt revenue bonds."

Although, as noted above, the optimal financing mechanisms will necessarily involve the issuance of some form of revenue bonds, the precise financing and procurement arrangements cannot be determined now due to the volatility of the tax laws and current financial markets. These arrangements will therefore have to be determined at a later time when the project nears reality. Recently proposed changes to Federal and State laws pertaining to public project financing may have been enacted by that time.

7.8.4.2 *Necessary Elements for Revenue Bond Financing*

In order to make the issuance of revenue bonds feasible, the investment community requires assurance of (1) a secure site for disposal of residue and non-processibles or bypass, (2) secure contracts for sale of the energy products, and (3) control over a secure supply of solid waste sufficient to keep the facility fully operational.

7.8.5 *Residue Disposal*

LARA owns the existing Creswell Landfill and is proposing an expansion that landfill and construction of a new landfill at the Frey Dairy Farms, Inc. site. These actions should provide sufficient capacity for residue disposal for the long-term future.

It will be necessary for LARA and its successor, LCSWMA, to assure that other waste does not impair the capacity required for disposal of residue over the life of the facility. As owner of the

landfill, LARA or LCSWMA can clearly restrict access to use (1) as a residue disposal site and (2) by County residents only. *See*, e.g., *Reeves v. Stake*, 447 U.S. 449 (1980); *Shayne Brothers, Inc. v. District of Columbia*, 592 F. Supp. 1128 (D.D.C. 1984); *County Commissioners of Charles County v. Stevens*, 20 E.R.C. 2080 (Md. 1984); *cf. Glassboro v. Gloucester County Board of Chosen Freeholders*, ____N.J.____, ____A.2d _____(1985).

7.8.6 *Energy Contracts*

The type and number of energy sale contracts which will be required will depend upon the siting of the Facility and the type of energy market at that site. Long term contracts will be required with one or several industrial, institutional or commercial customers (including possibly Pennsylvania Power and Light) for sale of electricity and steam (if customers can be identified). The terms of these contracts will depend upon the needs of the customer, the type of facility and the site.

The requirement for energy contracts is secondary to the other requirements, because financing for the Facility will primarily be supported by tipping fees. Energy sales serve to offset these tipping fees and are not essential for financing construction and operation of the Facility if there is adequate assurance that waste flows will be directed to the Facility regardless of the tipping fees. However, the energy contracts are crucial to minimizing costs to the users within the County.

7.8.7 *Options for Waste Flow Control*

For the foregoing reasons, waste flow control is the key factor for securing feasible financing for the waste-to-energy facility. The investment community in general, and LARA's current investment bankers specifically will require: (1) "put or pay" contracts assuring solid waste flow to a resource recovery facility ("waste flow contracts") and/or (2) secure legal controls over waste flow, such as waste flow ordinances, statutes or franchises, requiring delivery of all waste within a given jurisdiction to the Facility ("waste flow ordinance"). Under a "put or pay contract" the waste generator or some other entity which delivers waste to the Facility guarantees that the Facility will receive a certain minimum monthly amount of waste ("Minimum Monthly Commitment") and if that Minimum Monthly Commitment is not satisfied, the guarantor must agree

to pay the Facility owner or operator for any deficit. Either waste flow contracts or waste flow ordinances will assure the monthly waste flow and revenues necessary to secure a financing.

The social and political situation within the County would appear to make the use of waste flow contracts infeasible. Currently only four municipalities, representing only approximately 15 percent of the County's population, either collect waste themselves or contract with private firms to collect waste on the municipality's behalf. Thus, the vast majority of waste within the County, including waste within the most populous municipalities, is collected by private collector/haulers pursuant to individual contracts with each individual household or business. Waste flow contracts with private collector/haulers, as opposed to municipalities, simply do not provide a secure waste flow.

Entering into a put or pay contract with a municipality would provide security of waste flow and of payment in the event a Minimum Monthly Commitment is not satisfied. First, municipalities have a better ability to assure that they can obtain waste. Municipalities are by law responsible for collection, transportation, processing and disposal of municipal waste and are given the power to implement this responsibility by Section 202 of the Solid Waste Management Act. Pa. Stat. Ann. tit. 35 §6018.202 (Purdon. Supp. 1985). Moreover, one can be relatively certain that a municipality will not be displaced by another competitor, since the municipality has the option of paying for municipal collection and disposal with municipal tax revenues and providing this as a free municipal service to its residents. Second, a municipality, with its taxing power, will continue to exist for the life of any facility.

Private collector/haulers, on the other hand, are unlikely to be able to assure that they will be able to continue to collect the amount of waste they are collecting today over the 20- to 25-year life of a resource recovery facility. Moreover, these private collector/haulers could go out of business at any time. Accordingly, contracts with the private collector/haulers who presently serve the vast majority of the County's residents are unlikely to provide a secure waste flow.

Waste flow contracts could be utilized by the County if a sufficient number of municipalities representing a sufficient percentage of the County's population were willing to collect or to contract for the collection of trash. This has been an approach used in some regions. This, however, seems unlikely to succeed in Lancaster County, because it would require convincing the majority of municipalities to enter the trash collection and transportation business, with a corresponding tax levy to pay for this service. The municipalities within Lancaster County have apparently made a decision not to do this. Accordingly, it would not only be very difficult to implement such a system, but its very suggestion could create a disincentive for municipalities to approve the proposed County plan.

Therefore, the only viable option for securing the waste flow control necessary to make financing of the resource recovery facility feasible appears to be waste flow ordinances.

7.8.8 *Authority to Enact Waste Flow Ordinance*[4]

The authorization to enact waste flow ordinances is set forth in Section 202 of SWMA, which provides that "[m]unicipalities are authorized to require by ordinance that all municipal wastes generated within their jurisdiction shall be disposed at a designated facility." Pa. Stat. Ann. tit. 35, § 6018.202(c) (Purdon Supp. 1985). Section 103 of SWMA defines the term "municipality" to include "[a] city, borough, incorporated town, township or County or any authority created by any of the foregoing." *Id.*, § 6018.103. On the basis of the clear wording of the applicable statutory provision and definition, a County would appear to have the authority to enact a waste flow ordinance.

---

4. Ambiguities in the Pennsylvania Solid Waste Management Act ("SWMA"), Pa. Stat. Ann. tit. 35, §§6018.101 to 6018.1003 (Purdon Supp. 1985), relating to the authority of the County to adopt a waste flow ordinance, require the somewhat complex and multiple layers of contracts and agreements described below. This situation would be remedied by legislation now pending before the General Assembly, the proposed Pennsylvania Municipal Waste Planning and Resource Recovery Act, Senate Bill 1211. However, the pendency of that legislation, which may pass before the proposed County Plan is approved by the PADER, now somewhat further complicates the situation by requiring that its proposed requirements be considered.

7.8.9 *Ability of Municipalities to Delegate Authority to Adopt Waste Flow Ordinances*

The decision not to rely upon a determination that a County has unilateral power to enact a waste flow ordinance does not necessarily mean that a County must rely upon a multitude of municipal waste ordinances.

The Intergovernmental Cooperation Act authorizes municipalities, including counties, cities of the second class, second class A and third class, boroughs, incorporated towns, townships, school districts and other similar general purpose units of government, Pa. Stat. Ann. tit. 53, § 481 (Purdon 1974), to enter into joint cooperation or intermunicipal agreements "in the exercise or the performance of their respective governmental functions, powers or responsibilities." *Id.* § 483. In order to do so, the municipalities must (1) enter into an agreement *Id.*, § 483, and (2) adopt an ordinance which delegates or transfers any functions, powers or responsibilities and specifies (a) the conditions of the agreement, (b) the duration of the term of the agreement, (c) the purpose and objectives of the agreement, (d) the manner and extent of financing of the agreement, (e) the organizational structure necessary to implement the agreement and (f) the manner in which property, real or personal shall be acquired, managed or disposed of. *Id.*, § 487.

Accordingly, the County and various municipalities can enter into an intermunicipal agreement transferring the authority to adopt and administer a waste flow ordinance to the County or another single "municipality," thereby eliminating any ambiguity with respect to municipalities which are parties to the Intermunicipal Agreement.

There is one potential restriction on the ability to utilize an intermunicipal agreement to secure waste flows for the contract. It is not clear whether an authority, such as LARA, is a "general purpose unit" of government.[10] It therefore may be impossible to

10. The Intergovernmental Cooperation Act further appears to limit the definition of municipalities to units of government "hereafter created by the General Assembly." Fla. Stat. Ann. tit. 53, § 481, Authorities are created by municipalities.

make LARA or LCSWMA a party to an intermunicipal agreement.

Because LCSWMA will be responsible for financing and developing the Facility, if an Intermunicipal Agreement is used, a separate agreement must be entered into between the entity which will have power over waste flow and LCSWMA to assure LCSWMA that the waste flow will be secure and to assure LCSWMA will implement the plan as proposed.

7.8.10 *The Proper Party to Enact a Waste Flow Ordinance*

Because it is possible, using the mechanisms discussed above, for either a County or a number of municipalities to adopt the necessary waste flow ordinances, the County must decide whether it would be wise to rely upon a multiplicity of municipal ordinances or a single County ordinance.

Reliance upon a number of separate municipal waste flow ordinances would require LCSWMA to enter into an agreement with each municipality which elected to enact a waste flow ordinance. This approach may be unwieldy and undesirable to implement.

First, it would be far less efficient to adopt regulations and administer a multiplicity of ordinances than a single ordinance. Second, the County ordinance would apply throughout the County, even in those municipalities which fail to adopt municipal waste flow ordinances. While a county's unilateral authority is not entirely clear, a county ordinance would present a substantial chance of obligating the entire county to deliver waste to the facility. Third, it would be more difficult for LCSWMA to enforce its contractual rights that an ordinance be enacted, enforced and not amended if it were forced to look to a variety of municipalities. Finally, the proposed Municipal Waste Planning and Resource Recovery Act (SB 1211) would grant unilateral authority to the County to enact waste flow ordinances in accordance with the County plan. It would, therefore, seem wise to draft a plan that could take advantage of this power.

A countywide ordinance would therefore be preferable to several municipal ordinances in all the foregoing respects. Although a County's authority to adopt such an ordinance may be less clear than a municipality's, any municipality which would

adopt a waste flow ordinance would probably also be willing to enter into an intermunicipal agreement. Accordingly, this plan recommends reliance upon a single countywide ordinance enforced by the County and administered by LCSWMA, coupled with safeguards to maximize the County's authority to adopt that ordinance and to minimize the possibility that the ordinance can be invalidated with respect to all or any significant portion of the County's population.

7.8.11 *The Proposed Optimal Legislative Program*

The legislative program which is proposed in the Plan aims to accomplish the foregoing. It relies upon two separate agreements, an intermunicipal agreement among the municipalities within the County and an agreement between the County and LCSWMA, and two types of waste flow ordinances, a countywide ordinance and parallel municipal waste flow ordinances. As noted in Section 7.2, if County recycling goals are not met using a voluntary system, mandatory municipal or county source separation/recycling ordinances must be enacted. These ordinances would be accompanied by agreements with LCSWMA marketing and possibly picking up or processing source separated materials.

7.8.11.1 *Intermunicipal Agreement*

In the Intermunicipal Agreement (Appendix F) the County and the municipalities which are parties to that agreement ("Participating Municipalities") each agree to enact parallel waste flow ordinances which must (1) require the delivery of substantially all municipal waste collected within the municipality or the County, respectively, to the County "system," (2) prohibit collection of municipal waste by any person who is not licensed to dispose of waste by LCSWMA, and (3) prohibit new competing disposal facilities and expansion of existing facilities other than facilities serving other counties. The ordinances also recognize LCSWMA's authority to enact regulations governing collection, transportation and disposal of municipal waste at LCSWMA facilities. The Intermunicipal Agreement further provides that LCSWMA will continue to administer the licensing system currently administered by LARA and the County and the Participating Municipalities will be jointly responsible for

enforcing the waste flow ordinance system when LCSWMA provides information indicating that a violation is occurring.

The County further agrees to enter into a separate agreement with LCSWMA on behalf of itself and the municipalities in order to ensure the development of the resource recovery facility by LCSWMA. The Intermunicipal Agreement therefore requires the County, in the LCSWMA Agreement, to require that LCSWMA (1) build and finance the Facility, (2) provide coordination and transportation services for the County recycling program, (3) provide planning services, (4) provide administrative services for a solid waste advisory committee, and (5) continue to administer the licensing system.

The Intermunicipal Agreement also includes a variety of terms insuring that reasonable records be kept and that LCSWMA's fees be reasonable and based upon its actual costs. In order to induce all municipalities to join in the Intermunicipal Agreement, that agreement requires the County's agreement with LCSWMA to require that a premium be charged for each ton of waste collected in a municipality within the County which fails to execute the intermunicipal agreement within 90 days of PADER approval of this plan. The proposed facilities can only be securely sized to accommodate waste from participating municipalities. Therefore a premium will be imposed which is the greater of $1.00 per ton of an amount sufficient to compensate LCSWMA for additional costs (administrative, engineering, construction) incurred or to be incurred as a result of the municipality's not executing the agreement or executing the agreement after 90 days. The agreement will further provide that no waste may be accepted from outside of the county without the consent of the host municipality for the disposal site and that in no case will waste from outside the county be accepted if this would impair LCSWMA's ability to process and dispose of waste generated within the County. Finally the agreement will authorize LCSWMA to award a "host municipality" benefit payment or other benefits for locating a facility in a host municipality and recoup those costs through fees.

The Intermunicipal Agreement is for a term of 25 years and does not become effective until municipalities representing at least 60 percent of the population within the County have

executed the Agreement. This assures that, when the County adopts its waste flow ordinance, there will be no question of the County's authority to designate waste flows from municipalities which are expected to generate sufficient waste to make financing a Facility feasible.

7.8.11.2 *County/LCSWMA Agreement*

As contemplated by the Intermunicipal Agreement, the second legislative requirement for implementing the plan is a separate agreement the County and LCSWMA ("LCSWMA Agreement") (Appendix G). Although the LCSWMA Agreement, as drafted, is contemplated to be executed by the parties before the Intermunicipal Agreement becomes effective, its 25-year term would not commence until the requisite number of municipalities with the minimum percentage of population have executed the Intermunicipal Agreement.

In many respects, the LCSWMA Agreement echoes the requirements of the Intermunicipal Agreement. In the LCSWMA Agreement, the County agrees to enact a waste flow ordinance, not to amend it during the 25-year term of the LCSWMA Agreement without LCSWMA's consent, and to bring an enforcement action when LCSWMA provides it with information indicating that a violation has occurred or is occurring.

In the LCSWMA Agreement, LCSWMA agrees to construct the Facility in accordance with the implementation schedule set forth in the County's plan, arrange for the financing of the Facility as expeditiously and prudently as feasible and in accordance with the implementation schedule and accept waste for disposal regardless of the availability of the Resource Recovery Facility. LCSWMA is authorized to enter into contracts for additional waste with third parties but may not do so if it would impair LCSWMA's ability to accept all municipal waste generated within the County. LCSWMA further agrees to provide services relating to recycling and planning, to provide administrative support for the County Solid Waste Advisory Committee ("SWAC"), and to adopt regulations for and to administer the licensing system.

The LCSWMA Agreement makes LARA responsible for collection of tipping fees and maintainence of records regarding

these fees. A schedule of tipping fees must be published for each fiscal year. The fees must be based upon operating, administrative and capital costs, including amounts sufficient to cover debt service, depreciation, reserves, and host municipality benefits. LCSWMA is required to charge uniform rates for similar types of waste and may vary rates according to the site of delivery. LCSWMA may further direct that waste from certain regions be directed to a particular facility.

The LCSWMA Agreement also includes all the requirements of the Intermunicipal Agreement relating to record keeping, maintenance of scales and prohibition of competing facilities.

The LCSWMA Agreement is conditioned upon the execution of the Intermunicipal Agreement by municipalities representing at least 60 percent of the County's population, successful completion of financing, construction and acceptance of the Facility, and the continued availability of the Facility to accept "Acceptable Municipal Waste."

7.8.11.3 *County and Municipal Waste Flow Ordinances*

The municipal waste flow ordinance (Appendix D) and the County waste flow ordinance (Appendix E) are largely identical.

First, both ordinances adopt and describe the Intermunicipal Agreement in accordance with the requirements of Pa. Stat. Ann tit. 53 § 487 (Purdon 1974).

Second, they both require that only collectors licensed by LCSWMA operate within the applicable jurisdiction and require all such collectors and transporters to comply with rules and regulations enacted by LCSWMA. The ordinances provide that LCSWMA will continue to administer the licensing system, including issuance and revocation of licenses.

Third, both ordinances require disposal of all Acceptable Municipal Waste generated within the applicable jurisdiction to occur at sites designated by the County or LCSWMA, with the exception of waste which is source separated or recycled. Private waste processing and disposal facilities are generally prohibited with the exception of certain "existing facilities," which may continue receiving solid waste from sources which the existing facility specifically identifies in a notice which must be submitted within 60 days of the effective date of the ordinance. Existing

facilities are, however, prohibited to expand, except to facilities owned by another County if that expansion is consistent with a PADER approved municipal waste management plan. This assures that the County ordinance will not bring the County into a conflict with Chester County with respect to the Lanchester Landfill. The exemption of existing facilities would also apply to facilities such as hospital incinerators or institutional incinerators. These exceptions for existing facilities will not only protect the ordinances from certain constitutional challenges, but will also prevent unintended results (i.e., prohibition of incinerators for infectious or pathological waste).

In order to protect against certain other constitutional challenges, the ordinances also provide that they will not interfere with existing contracts. However, the ordinances require that any new contracts be consistent with the ordinances.

The ordinances set forth various unlawful activities and allow imposition of up to a three hundred dollar fine or imprisonment in lieu thereof, and revocation and denial of licenses, for violation of the ordinance.[11] Violations of the ordinances are declared to be public nuisances, and the ordinances authorize injunctive actions. The County and the municipalities which have enacted parallel ordinances are authorized jointly to enforce their respective ordinances. LCSWMA may revoke its licenses for violations of the ordinances.

The municipal waste flow ordinance differs from the County waste flow ordinance principally in the respect that the municipal ordinance specifically authorizes the County to adopt the County Ordinance. The County ordinance further provides that regulations concerning standards and procedures for licensing, license fees, terms of licenses, general procedures, record keeping, transportation routes and any other matters relating to licensing and use of LCSWMA facilities may be adopted by LCSWMA pursuant to Pa. Stat. Ann. tit. 53, § 314 within initial

11. It should be noted that the definition of "person," like the definition of "person" in SMWA, Pa. Stat. Ann. tit. 35 § 6018.103 (Purdon Supp. 1985), includes officers and directors of corporations, thereby making officers and directors of corporations subject to these penalties.

regulations to be adopted no later than 180 days prior to the date upon which the Resource Recovery Facility becomes fully operational.

Finally, the County ordinance includes a severability clause which provides that if the ordinance is invalidated with respect to any portion of the County, such invalidity will not affect the ordinance's applicability to other parts of the County. Thus, if the ordinance is invalidated in a non-participating municipality, it would remain in force in all Participating Municipalities.

These overlapping agreements and ordinances will thus provide the assured waste flow required for financing. They provide incentives for municipal participation and give the County and LCSWMA considerable flexibility in making the arrangements to finance and develop the Facility.

These overlapping agreements and ordinances will thus provide the assured waste flow required for financing. They provide incentives for municipal participation and give the County and LCSWMA considerable flexibility in making the arrangements to finance and develop the Facility.

* * *

(25)

No. 92-1402

Supreme Court, U.S.
FILED
AUG 23 1993
OFFICE OF THE CLERK

In The

Supreme Court of The United States

October Term, 1993

C & A CARBONE, INC.
RECYCLING PRODUCTS OF ROCKLAND, INC.,
C & C REALTY, INC., and
ANGELO CARBONE,

Petitioners,

vs.

TOWN OF CLARKSTOWN,

Respondent.

On Writ of Certiorari to the Supreme Court
Appellate Division, Second Department
of the State of New York

AMICUS CURIAE BRIEF OF ROCKLAND COUNTY IN SUPPORT OF RESPONDENT

ILAN S. SCHOENBERGER
Counsel of Record for Rockland County
Allison-Parris Office Building
11 New Hempstead Road
New City, New York 10956
(914) 638-5180

MICHAEL D. DIEDERICH, JR.
Asst. County Attorney

Appeal Press
(914) 345-8585 (212) 267-8802 (800) 371-3844 (2581)

BEST AVAILABLE COPY

TABLE OF CONTENTS

Statement of the Case 3

Summary of Argument 9

Argument

I. EXCLUSIVE LOCAL MANAGEMENT OF LOCAL SOLID WASTE, WHETHER USING A "FLOW CONTROL" ORDINANCE OR OTHER MEANS, IS A CONSTITUTIONALLY PERMISSIBLE ACTIVITY OF MUNICIPAL GOVERNMENT 13

II. "FLOW CONTROL" ALLOWS SOLID WASTE SELF-DETERMINATION 26

Conclusion 34

TABLE OF AUTHORITIES

Hybud Equip. Corp. v. City of Akron, Ohio,
654 F. 2d 1187, 1192 (6th Cir. 1981) 14

National League of Cities v. Usery,
426 U.S. 833, 855-56 n.20 (1976) 14

Garcia v. San Antonio Metro. Transit Authority,
469 U.S. 528 (1985) 14

Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources,
504 U.S. __, 112 S. Ct. 2019 (1992) *passim*

Philadelphia v. New Jersey,
437 U.S. 617 (1978) *passim*

Town of Hallie v. City of Eau Claire,
471 U.S. 34, 37, 42 (1985) 23

Sporhase v. Nebraska ex rel Douglas,
458 U.S. 941 (1982) 24

Baldwin v. G.A.F. Seelig, Inc.,
294 U.S. 511, 523 (1935) 26

California Reduction Co. v. Sanitary Reduction Works,
199 U.S. 305 (1905) 27

Reeves, Inc. v. Stake,
447 U.S. 429, 441 (1980) 32

McCarroll v. Dixie Lines,
309 U.S. 176, 188-89 (1940) 33

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No. 91-1402

C & A CARBONE, INC., RECYCLING PRODUCTS
OF
ROCKLAND, INC and ANGELO CARBONE,

Petitioners,

-- v.--

THE TOWN OF CLARKSTOWN,

Respondent.

BRIEF OF THE COUNTY OF ROCKLAND AS AMICUS CURIAE SUPPORTING RESPONDENT

The respondent Town of Clarkstown (hereinafter "Town") is located within the County of Rockland ("County"). The amicus County is responsible for the planning, development and implementation of solid waste management in the county and which presently anticipates the expenditure of 60 million to 85

million dollars in solid waste capital projects, the viability of which may well hinge on the Court's ruling in this case.

A decision of this Court which extinguishes local government's power to direct solid waste to designated facilities, as through a "flow control" ordinance, will imperil Rockland County's solid waste management efforts. Therefore, the County respectfully submits this amicus curiae brief, urging affirmance.

STATEMENT OF THE CASE

The facts pertinent to the dispute between the parties have been fully set forth in their respective briefs. The County adopts herein the facts as stated by the respondent Town of Clarkstown.

From the standpoint of the amicus County, it is critical that the Court affirm the fundamental responsibility of local government to regulate and manage local solid waste. The degree of management of waste can range from the incidental regulation of local private trash collectors to total municipal collection and disposal. Nevertheless, the ultimate responsibility for the health, safety and welfare of local citizens lies with local governments who strive, within

the limits of their resources and skills, to do what they deem best for their citizens.

Rockland County Solid Waste Management

Rockland County has expended more than two million dollars ($2,000,000) in solid waste planning. Its solid waste management plan ("plan") analyzes the county's solid waste condition and establishes a strategy for rationally, and effectively, managing this waste. The plan includes provision for the following subcomponents of solid waste:

--medical waste
--construction and demolition debris
--residential curbside recyclables
--commercial recyclables
--compostable sewage sludge
--compostable leaves, brush & wood chips
--non-recycled "refuse"
--household hazardous waste

As part of the County's overall plan, the County endeavors to site three major solid waste facilities: a "materials recovery" facility; a "sludge co-composting" facility; and a "construction & demolition debris/mixed bulky waste" facility. The estimated cost for these three facilities is between 60 and 85 million dollars. In order to obtain financing for the construction of these facilities, the County must ensure that locally-generated waste be delivered, that is "flow", to its facilities.

Facility Financing

Throughout the nation, financing solid waste facilities depends on an assurance of a supply of waste.[1] Essentially, there are only limited means of assuring this supply. Flow control or designation ordinances are one proven device. Municipal collection, or the creation of a refuse district, authority or public corporation, are other means.

Using a flow control ordinance, waste is directed to a designated waste management facility and delivery ("tip") fees are paid at the facility's

---

[1] It would be both politically unacceptable and fiscally irresponsible to construct a waste facility at great taxpayer cost, and then underutilize it.

gate. Using the other means of waste management, disposal charges are paid prior to delivery, typically by a tax bill or special assessment.[2]

Whatever the means of municipal waste management that may be employed, the end result is that local waste is sent to locally-designated facilities for processing or disposal. The waste may never be exported from the jurisdiction at all, for example, if it is landfilled or incinerated.[3]

---

[2] Prior payment of disposal fees, through ad valorem taxes, special assessment, user fees or the like is sometimes called "economic flow control" because the delivery cost is minimal or nothing since local citizens have paid in advance.

[3] As the municipality may concededly do, at its option.

Otherwise, it is only after the municipality has completed its waste management activities (e.g., recycling, composting or consolidation at a transfer station) that it is appropriate to consider placing the recyclables, the compost, or the consolidated garbage into the solid waste marketplace.

Amicus County's planned recycling facilities are a vital part of the County's solid waste management plan. Without them, the County will be forced to rely on the uncertainties of the waste disposal marketplace. Absent the ability to act responsibly and control its own waste destiny, the implementation of the County's solid waste management plan may become fiscally oppressive to the County's

taxpayers as the disposal of waste becomes ever more difficult and costly.

SUMMARY OF ARGUMENT

Local municipal solid waste management and disposal is a traditional governmental activity. It is not protectionist and violates neither the spirit nor the letter of the Commerce Clause.

Local waste management must be distinguished from local interference with waste moving in interstate channels of commerce. For example, import restrictions are often properly regarded as protectionist. To the extent that they may seek to "protect" a locality by interfering with private transactions concerning out-of-state

waste which may enter the local jurisdiction--waste which is "in commerce"--they are unconstitutional. See, Philadelphia v. New Jersey and Fort Gratiot Landfill, Inc. v. Michigan Department of Natural Resources, infra.

Management of local waste through "flow control" requires local management of locally generated solid waste at designated facilities. Flow control[4], sometimes called "designation", is readily distinguishable from the type of import restrictions found in Philadelphia and Fort Gratiot. Flow

---

[4] Petitioners attempt to define flow control as any interference with waste flow. This mischaracterizes the term. As used in this brief, and as the term is generally used, "flow control" means flowing locally-generated solid waste to municipally-designated waste management facilities.

control allows local dominion over municipal waste, a legitimate health and safety endeavor, before such waste ever becomes an article of interstate trade. By directing local waste to specific facilities, flow control allows government to finance its solid waste facility for community use, thus insuring the facility's use if, for example, cheaper short-term alternatives exist elsewhere. In addition, the local facilities may completely dispose of the waste, as through landfilling or incineration, and therefore eliminate any potential waste "commerce" in the waste thus disposed.

If every community in the United States enacted flow control requiring, in the first instance, the local community to attempt to manage its own

waste, this would give each an opportunity to solve its own waste problem through waste reduction, reuse or recycling. Such universally local waste management would be no different from universally local management of fire, crime and sewage. If the community falls short of its waste management goals, it need only send the unmanaged waste out into the constitutionally protected channels of interstate commerce.

Flow control is a simple, democratic and equitable means of solving a national problem through local efforts and waste self-determination.

ARGUMENT

I. EXCLUSIVE LOCAL MANAGEMENT OF LOCAL SOLID WASTE, WHETHER USING A "FLOW CONTROL" ORDINANCE OR OTHER MEANS, IS A CONSTITUTIONALLY PERMISSIBLE ACTIVITY OF MUNICIPAL GOVERNMENT

Solid waste and civilization have evolved together. Through modern science, we have come to realize the basic necessity of proper waste management, not merely to eliminate odors and disease, but also to avoid groundwater contamination, conserve energy, protect stratospheric ozone and save forests.

Like municipal provisions for fire, police and sewer services, local solid waste management (in its most basic form, the garbage collection at issue in this case) is an essential

public service, and primarily a local concern.[5]

A. The Local Role in Local Waste Management is Primary

Waste management is an important function of local government, and vital to the integrity of the local community. It is a function traditionally, and by federal statute,

---

[5] Hybud Equip. Corp. v. City of Akron, Ohio, 654 F.2d 1187, 1192 (6th Cir. 1981)("[c]ontrol of local sanitation, including garbage collection and disposal, like fire and police protection, is a traditional, paradigmatic example of the exercise of municipal police powers reserved to state and local government under the Tenth Amendment...."), vacated on other grounds, 455 U.S. 931 (1982)(emphasis added); see also, National League of Cities v. Usery, 426 U.S. 833, 855-56 n.20 (1976), overruled on other grounds, Garcia v. San Antonio Metro. Transit Authority, 469 U.S. 528 (1985).

reserved to state and local governments.

As Congress has expressly declared, "the collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies." Resource Conservation and Recovery Act (RCRA) Sec. 1002(a)(4), 42 U.S.C. Sec. 6901(a)(4). If local government was, and is, to "continue" to be responsible for "collection and disposal," Congress certainly could not have intended to deny local government the ability to continue to manage local solid waste. Nevertheless, this will result if the Court denies municipalities the right to use flow control or similar means to "collect and dispose" of local waste.

There are very limited means for a

municipality to manage waste. One means is flow control, which directs local waste to locally-designated facilities. The creation of a utility, or a refuse district, or municipal collection are other means. Each of these latter variations has the same result, vis-a-vis the solid waste involved: each causes solid waste to flow to municipally-designated facilities for "collection and disposal."

It is self-evident that municipal waste collection and disposal (landfilling, incineration) completely deprives private merchants of garbage. Thus, if private industry has a constitutional "right" to such waste, as Petitioners' amici argue, then the means of collection and disposal is

immaterial. Taken to its logical conclusion, all means of municipal control which deprive the garbage industry of waste would be considered equally offensive, and attempts at waste reduction, reuse and recycling would have to be abandoned as violative of the rights of the trash "merchants". Individuals would ultimately be encouraged to maintain the same high American level of waste generation and deterred from helping to reduce garbage proliferation. This is an absurd view which is legally untenable.

B. Local Garbage, Ideally, Never Becomes an "Object of Interstate Trade"

This Court has never visited the issue of when solid waste becomes a part of interstate commerce. It is

respectfully submitted that the Court should consider this question, and find that there is no per se constitutional right to garbage, as "commerce," because locally managed local waste is simply not an "article of commerce."

a. Banning "objects of trade" is protectionist

This Court has clearly stated that "[a]ll objects of interstate trade merit Commerce Clause protection; none is excluded by definition at the outset." Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources, 504 U.S. __, 112 S.Ct. 2019, 2023 n.3 (1992) citing Philadelphia v. New Jersey, 437 U.S. 617 (1978). As stated in Fort Gratiot, "whether the business arrangements between the out-of-state generators of

waste and the [private site operator] are viewed as 'sales' of garbage or 'purchases' of transportation and disposal services, the commercial transactions unquestionably have an interstate character." 504 U.S. at ___, 112 S.Ct. at 2023.

Both Fort Gratiot, supra and Philadelphia, supra, involved waste which was unquestionably an "object of trade" where significant commercial interests were stymied at one state's border through a discriminatory import ban. Absent court intervention, such trade would cease and retailiatory garbage barriers likely erected.

While the transportation and disposal of garbage certainly constitutes a multi-billion dollar business, the waste industry is not,

however, entitled under the Commerce Clause to hinder local government's efforts to manage, reduce and eliminate municipal solid waste.

b. Local waste does not become an "object of interstate trade" until exported; it is not an object of any trade when managed, reduced or eliminated municipally

Local waste management is distinguishable from protectionism. The garbage industry has no right to waste which is reduced, recycled, eradicated or otherwise managed locally, because waste does not become an "object of interstate trade" until it is actually traded. Otherwise, any efforts at waste reduction, reuse or recycling would impermissibly interfere with constitutionally protected commerce. See, I.A., supra.

There is nothing said in Philadelphia or Fort Gratiot which indicates that it is impermissible for local government to manage local waste, and certain references indicate the contrary.[6] To a casual observer, local garbage sitting at a curb, or being trucked to the local landfill, is not an "object of interstate trade." On the other hand, garbage in a truck destined for a distant landfill or waste-to-energy plant would certainly appear to be such an object of commerce.

Herein lies the distinction. It

---

[6] See, e.g., Philadelphia, supra, 437 U.S. at 627; Fort Gratiot, supra, 504 U.S. at __, 112 S.Ct. at 2023, n.3.

is the failure or inability of the local government to manage the waste, necessitating the interstate movement of the waste, which creates the "commerce" protected by the Commerce Clause. The interstate garbage market is available to grapple with the unmanaged waste for a fee. However, if the waste can be eliminated at the source, or managed locally, through incineration, recycling, composting or the like, then the need for an interstate transaction never arises, and the solid waste never becomes an object of interstate trade. Waste is, by definition, unlike merchandise, commodities or raw products which are items of value sought for commerce. Waste is waste, for otherwise it would be sold for profit by its generator.

Only waste merchants seek waste, because they profit by offering disposal services.

The view that waste is not per se an "article of commerce" is not a novel concept. Sewage waste, for example, is disposed of locally. In Town of Hallie v. City of Eau Claire, 471 U.S. 34, 37, 42 (1985), this Court upheld a municipality's right to directly control the flow of sewage and, as against an antitrust challenge, went on to uphold the monopoly in municipal sewage treatment services and "tying arrangements" in waste collection and transportation. Sewage is a waste akin to solid waste, and sewage sludge is a type of solid waste. It would be quite anomolous to allow sewer districts to control the flow of sewage, but to deny

garbage districts this means of waste control.

In Sporhase v. Nebraska ex rel Douglas, 458 U.S. 941 (1982), this Court examined the issue of whether groundwater, indisputably a valuable commodity, was an "article of commerce" and determined that it was. However, the dissent raised an important distinction between regulating "commerce" and denominating materials as articles of commerce. The two concepts are different. Waste need not be considered as an article of commerce when locally managed, even though Congress certainly can, and does, regulate waste management as "affecting commerce."

The Commerce Clause principles enunciated in Philadelphia and Fort

Gratiot are not that local government cannot endeavor to solve local waste problems by managing or eliminating solid waste, but rather that discriminatory restrictions smacking of protectionism are improper when they interfere with the commerce of interstate waste disposal.

There is a fundamental difference between the type of protectionism which this Court found offensive in Philadelphia and Fort Gratiot, and non-discriminatory, self-deterministic "home rule" over garbage. The Commerce Clause requires that the peoples of the several states must sink or swim together, even in our collective

garbage.[7] Distinguishing waste which is locally managed, as through flow control, from waste which has been placed into the interstate garbage marketplace, will allow us all to swim rather than sink.

II. "FLOW CONTROL" ALLOWS SOLID WASTE SELF-DETERMINATION

Flow control allows environmentally sound and economical management of solid waste. It is not "protectionist", but rather serves to protect health, welfare and the environment without "Balkanizing" the

---

[7] Paraphrase of L. Tribe's gloss on Justice Cardozo's summation in Baldwin v. G.A.F. Seelig, Inc, 294 U.S. 511, 523 (1935). L. Tribe, AMERICAN CONSTITUTIONAL LAW 426 (2d Ed. 1988).

Union or isolating individual states from the national solid waste problem.[8] Flow control ordinances help solve the solid waste problems at the source. They allow the development and financing of locally-crafted solutions to handle locally generated waste.

The legality of flow control has long been recognized by this Court. In California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 305 (1905), this Court expressly approved of municipal garbage flow control, against

---

[8] Extend the reasoning to international relations. Suppose Canada decided to manage all the solid waste it generates within its own borders. Should the United States "retaliate" by managing all the waste within our borders, perhaps through waste reduction, reuse or recycling?

a due process challenge, when it allowed San Francisco to award an exclusive franchise for waste collection and disposal at a city-designated site.

Extending the California Reduction holding further, if a city were able to direct all local garbage to local facilities capable of completely eliminating the waste -- through reduction, recycling and composting--this achievement should not be viewed as a Commerce Clause violation. Rather, it should be applauded. Waste elimination is not an interference with commerce. Rather, it helps commerce by reducing the economic inefficiencies, environmental damage, and other "externalities" associated with waste.

Perhaps most importantly, our very

democracy is impaired if a community is prohibited from waste self-help. Local voters should be able to choose to install progressive waste facilities, and to direct community waste to these facilities. Private merchants should have no standing to challenge this. It is simply undemocratic, under the cover of a dormant Commerce Clause justification, to deny waste self-determination to local government. Cf. U.S. Constitution, Art. IV, Sec. 4 (Guaranty Clause).

Flow Control as a Favorite (and Possibly Best) Tool

By directing waste to a municipal facility through "flow control", a supply of waste and therefore a source of tipping fee income, can be guaranteed. Facility bondholders re-

quire this or similar guarantees, such as a bond backed by local taxpayers. The benefits of flow control are twofold. First, it guarantees waste flow to a facility. This is the same guarantee which can be given by a garbage district, utility, authority, using "economic flow control", or by municipal collection.

The second benefit to flow control is that the "tipping fee" charged reflects the "real costs" of environmentally proper disposal. Because waste is directed by law to the facility, the facility can charge the actual or "real" cost of disposal, by factoring in both the long-term costs of waste disposal, and the "external" costs of improper disposal. Alternatives to flow control, such as tax

assessment, still will cause waste to flow to designated facilities (because the tip fee can be reduced to zero). However, the direct relationship between delivery and payment is lost, and consequently there is less incentive to reduce or recycle the waste.

Federalism and local waste management

Congress, through the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. Sec. 6901 et seq., has allowed the states to become solid waste laboratories, and thus left them the responsibility and ability to experiment in solving the solid waste

crisis.[9] This is consistent with the traditionally local nature of solid waste management, and with basic concepts of American federalism. The Court should uphold flow control because it achieves the same waste flow ends as municipal collection or other means of local waste control.

Petitioners characterize the issues present in this case as narrow--whether solid waste import restrictions are equivalent to local management of local waste, and therefore equally impermissible. As argued in this

---

[9] Cf. Reeves, Inc. v. Stake, 447 U.S. 429, 441 (1980)(applying commerce clause to South Dakota's innovative approach to local cement shortage would diminish the value of the states as social and economic laboratories).

brief, there is a profound difference which favors upholding flow control and equivalent means of managing local waste.

If the historical and RCRA-sanctioned role of local government in managing local waste is to be abandoned, this is the exclusive perogative of Congress. As noted 50 years ago by Justices Black, Frankfurter and Douglas:

"Judicial control of national commerce--unlike legislative regulations--must from inherent limitations of the judicial process treat the subject by the hit-and-miss method of deciding single local controversies upon evidence and information limited by the narrow rules of litigation. Spasmodic and unrelated instances of litigation cannot afford an adequate basis for the creation of integrated national rules which alone can afford the full protection for interstate commerce intended by the Constitution.

McCaroll v. Dixie Lines, 309 U.S. 176, 188-89 (1940)(Black, Douglas and

Frankfurter, JJ, dissenting). Clearly, it is not unconstitutional for local government to manage local waste.

CONCLUSION

Municipal management of solid waste is not a commercial activity and the garbage involved is not an article of commerce. Therefore, local government can manage, and to the extent feasible, reduce, recycle and eradicate local solid waste without running afoul of the dormant Commerce Clause. This is consistent with traditional notions of federalism, and RCRA's deference to state and local government in solid waste management. Flow control allows waste self-determination, either by managing the waste locally, or by sending it out into the protected

stream of interstate commerce.

Therefore, the decision of the Appellate Division should be affirmed.

ILAN S. SCHOENBERGER
County Attorney, County of Rockland
Allison-Parris Office Building
11 New Hempstead Road
New City, New York 10956
(914) 638-5180

MICHAEL D. DIEDERICH, JR.
Assistant County Attorney
(Counsel of Record)